No. 18-15	
Title:	James L. Kisor, Petitioner v. Robert Wilkie, Secretary of Veterans Affairs
Docketed:	July 2, 2018
Linked with 17A1154	
Lower Ct:	United States Court of Appeals for the Federal Circuit
Case Numbers:	(16-1929)
Decision Date:	September 7, 2017
Rehearing Denied:	January 31, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Apr 19 2018	Application (17A1154) to extend the time to file a petition for a writ of certiorari from May 1, 2018 to June 29, 2018, submitted to The Chief Justice. Main Document Lower Court Orders/Opinions Proof of Service
Apr 24 2018	Application (17A1154) granted by The Chief Justice extending the time to file until June 29, 2018.
Jun 29 2018	Petition for a writ of certiorari filed. (Response due August 1, 2018) Petition Appendix Certificate of Word Count Proof of Service
Jul 25 2018	Motion to extend the time to file a response from August 1, 2018 to August 31, 2018, submitted to The Clerk. Main Document
Jul 26 2018	Motion to extend the time to file a response is granted and the time is extended to and including August 31, 2018.
Jul 27 2018	Brief amici curiae of Southeastern Legal Foundation and The Beacon Center of Tennessee filed. Main Document Certificate of Word Count Proof of Service
Jul 27 2018	Brief amicus curiae of Center for Constitutional Jurisprudence filed. Main Document Certificate of Word Count Proof of Service
Aug 01 2018	Brief amicus curiae of The Chamber of Commerce of the United States of America filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Aug 01 2018	Brief amici curiae of National Association of Home Builders, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 01 2018	Brief amici curiae of The State's of Utah, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 17 2018	Motion to extend the time to file a response from August 31, 2018 to October 1, 2018, submitted to The Clerk. **Main Document**
Aug 20 2018	Motion to extend the time to file a response is granted and the time is further extended to and including October 1, 2018.
Sep 26 2018	Motion to extend the time to file a response from October 1, 2018 to October 31, 2018, submitted to The Clerk. **Main Document**
Sep 27 2018	Motion to extend the time to file a response is granted and the time is further extended to and including October 31, 2018.
Oct 31 2018	Brief of respondent Robert Wilkie, Secretary of Veterans Affairs in opposition filed. **Proof of Service** **Main Document**
Nov 19 2018	Reply of petitioner James L. Kisor filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2018	DISTRIBUTED for Conference of 12/7/2018.
Dec 10 2018	Petition GRANTED limited to Question 1 presented by the petition.
Jan 16 2019	Blanket Consent filed by Respondent, Robert Wilkie, Secretary of Veterans Affairs **Blanket Consent**
Jan 24 2019	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
Jan 24 2019	Brief of petitioner James L. Kisor filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 25 2019	SET FOR ARGUMENT on Wednesday, March 27, 2019
Jan 30 2019	Brief amici curiae of Pacific Legal Foundation, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Jan 31 2019	Brief amici curiae of State and Local Government Associations filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations in support of neither party filed. **Main Document** **Proof of Service** **Proof of Service** **Other**
Jan 31 2019	Brief amicus curiae of The Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of National Veterans Legal Services Program, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amicus curiae of Utility Air Regulatory Group filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amicus curiae of Professor Thomas Merrill filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of Professors - Dean Ronald A. Cass, Christopher DeMuth, Sr., and James L. Huffman filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jan 31 2019	Brief amicus curiae of Washington Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amicus curiae of Center for Workplace Compliance filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of National Immigrant Justice Center and American Immigration Lawyers Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of National Organization of Veterans' Advocates, Inc., et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of National Association of Home Builders, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of Stephen C. Connaker and the Military and Veterans' Law Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of States of Utah, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Jan 31 2019	Brief amicus curiae of Public Citizen, Inc. in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amicus curiae of Center for Constitutional Jurisprudence filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of Professors of Administrative Law and Federal Regulation in support of neither party filed. (Corrected version submitted)
Jan 31 2019	Brief amici curiae of Professors of Administrative Law and Federal Regulation in support of neither party filed (2/14/19). (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count** **Other**
Jan 31 2019	Brief amicus curiae of Sergeant Major Jeff S. Howard (Retired) filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of The Cato Institute, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amici curiae of Southeastern Legal Foundation, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amicus curiae of National Right to Work Legal Defense Foundation, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amicus curiae of New Civil Liberties Alliance filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amicus curiae of Jeremy C. Doerre filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 31 2019	Brief amicus curiae of Atlantic Legal Foundation filed. **Main Document** **Certificate of Word Count** **Other**
Feb 14 2019	CIRCULATED
Feb 21 2019	Record requested from the U.S.C.A. Federal Circuit.
Feb 25 2019	Brief of respondent Robert Wilkie, Secretary of Veterans Affairs filed. (Distributed) **Main Document** **Proof of Service**
Feb 28 2019	The record received from the U.S.C.A. Federal Circuit is electronic and located on PACER. The record is complete.

Feb 28 2019	The record received from U.S. Court of Appeals for Veterans Claims are electronic and located on USCAVC web site. Also received are the pleadings from USCAVC which is confidential, (1 Envelope).
Mar 04 2019	Brief amici curiae of Administrative Law Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief amicus curiae of Senator Sheldon Whitehouse filed. ((Distributed). **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 14 2019	Reply of petitioner James L. Kisor filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 27 2019	Argued. For petitioner: Paul W. Hughes, Washington, D. C. For respondent: Noel G. Francisco, Solicitor General, Department of Justice, Washington, D. C.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Paul Whitfield Hughes Counsel of Record	Mayer Brown LLP 1999 K Street NW Washington, DC 20006 PHughes@mayerbrown.com	(202) 263-3000
Party name: James L. Kisor		
Attorneys for Respondent		
Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217
Party name: Robert Wilkie, Secretary of Veterans Affairs		
Other		
Jean-Claude Andre Counsel of Record	Sidley Austin LLP 555 W. Fifth Street Suite 4000 Los Angeles, CA 90013 jcandre@sidley.com	(213) 896-6000
Party name: National Immigrant Justice Center and American Immigration Lawyers Association		
Corbin Knight Barthold Counsel of Record	Washington Legal Foundation 2009 Massachusetts Ave., NW Washington, DC 20036 cbarthold@wlf.org	2025880302

Party name: Washington Legal Foundation

Michael Patrick Bracken
Counsel of Record

NT Lakis, LLP
1501 M Street, Suite 1000
Washington, DC 20005

mbracken@ntlakis.com

2026295800

Party name: Center for Workplace Compliance

William James Brown Jr.
Counsel of Record

Brown Wegner LLP
2010 Main Street, Suite 1260
Irvine, CA 92614

bill@brownwegner.com

9497050080

Party name: Stephen C. Connaker, et al.

Anthony Thomas Caso
Counsel of Record

Center for Constitutional Jurisprudence
Chapman University, Fowler School of Law
One University Drive
Orange, CA 92866

caso@chapman.edu

877-855-3330

Party name: Center for Constitutional Jurisprudence

Tyler Green
Counsel of Record

Utah Solicitor General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320

tylergreen@agutah.gov

(801) 538-9600

Party name: State's of Utah, et al.

Kimberly Stewart Hermann
Counsel of Record

Southeastern Legal Foundation
560 W. Crossville Rd.
Suite 104
Roswell, GA 30075

khermann@southeasternlegal.org

(770) 977-2131

Party name: Southeastern Legal Foundation, et al.

Raymond J. LaJeunesse Jr.
Counsel of Record

National Right to Work Legal Foundation
8001 Braddock Rd, Suite 600
Springfield, VA 22151

rjl@nrtw.org

703-321-8510

Party name: National Right to Work Legal Defense Foundation, Inc.

Mark W. Mosier
Counsel of Record

Covington & Burling, LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001

mmosier@cov.com

202-662-5435

Party name: The Chamber of Commerce of the United States of America

Donald B. Verrilli Jr.
Counsel of Record
Munger, Tolles & Olson LLP
1155 F Street NW
7th Floor
Washington, DC 20004
202-220-1101
donald.verrilli@mto.com

Party name: ADMINISTRATIVE LAW SCHOLARS

Sheldon Whitehouse
Counsel of Record
Hart Senate Offic Bldg. Ste. Rm. 530
Washington, DC 20017
(202) 224-2921
counsel@whitehouse.senate.gov

Party name: Senator Sheldon Whitehouse

Evan Andrew Young
Counsel of Record
Baker Botts, L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, TX 78701-4078
512-322-2500
evan.young@bakerbotts.com

Party name: National Association of Home Builders, et al.

Ronald Andrew Cass
Counsel of Record
Cass & Associates, PC
10580 Fox Forest Drive
Great Falls, VA 22066
202.438.7590
roncass@cassassociates.net

Party name: Professors - Dean Ronald A. Cass, Christopher DeMuth, Sr., and James L. Huffman

Jeremy Cooper Doerre
Counsel of Record
Tillman Wright, PLLC
11325 N. Community House Road,
Suite 250
Charlotte, NC 28277
7042484883
jdoerre@ti-law.com

Party name: Jeremy C. Doerre

Anthony Lee Francois
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
alf@pacificlegal.org

Party name: Pacific Legal Foundation

Matthew James Ginsburg
Counsel of Record
American Fed. of Labor and Congress of Industrial
815 16th St., N.W.
Washington, DC 20006
202-637-5397
mginsburg@aflcio.org

Party name: American Federation of Labor and Congress of Industrial Organizations

Allyson Ho
Counsel of Record
Gibson, Dunn & Crutcher LLP
2100 McKinney Avenue
Suite 1100
Dallas, TX 75201
214-698-3233
aho@gibsondunn.com

Party name: State and Local Government Associations

William McGinley Jay
Counsel of Record
Goodwin Procter, LLP
901 New York Ave., NW
Washington, DC 20001
2023464190
WJay@goodwinlaw.com

Party name: Professor Thomas Merrill

Martin Sander Kaufman
Counsel of Record
Atlantic Legal Foundation
500 Mamaroneck Avenue
Suite 320
Harrison, NY 10528
914.472.2356
mskaufman@atlanticlegal.org

Party name: Atlantic Legal Foundation

Vincent Gregory Levy
Counsel of Record
Holwell Shuster & Goldberg, LLP
425 Lexington Avenue
New York, NY 10017
6468375151
vlevy@hsgllp.com

Party name: PROFESSORS OF ADMINISTRATIVE LAW AND FEDERAL REGULATION

Elbert Lin
Counsel of Record
Hunton Andrews Kurth LLP
951 E. Byrd Street
Riverfront Plaza, East Tower
Richmond, VA 23219-4074
804-788-7202
elin@HuntonAK.com

Party name: Utility Air Regulatory Group

Roman Martinez V
Counsel of Record
Latham & Watkins, LLP
555 Eleventh Street, NW
Washington, DC 20004
202-637-3377
roman.martinez@lw.com

Party name: National Organization of Veterans' Advocates, Inc., et al.

Jonathan F. Mitchell
Counsel of Record
Mitchell Law PLLC
106 East Sixth Street
Suite 900
Austin, TX 78701
5126863940
jonathan@mitchell.law

Party name: New Civil Liberties Alliance

Scott Lawrence Nelson
Counsel of Record
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
202-588-1000
snelson@citizen.org

Party name: Public Citizen, Inc.

Amy Mason Saharia
Counsel of Record
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005
202-434-5000
asaharia@wc.com

Party name: National Veterans Legal Services Program et al.

Ilya Shapiro
Counsel of Record

Cato Institute
1000 Massachusetts Ave., NW
Washington, DC 20001

ishapiro@cato.org

2028420200

Party name: The Cato Institute, et al.

Shawn Terry Welch
Counsel of Record

Holland & Hart, LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101

stwelch@hollandhart.com

8017995800

Party name: Jeff S. Howard

No.

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE,
Acting Secretary of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Petitioner

QUESTIONS PRESENTED

Auer v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Separately, in *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), the Court held that "interpretive doubt is to be resolved in the veteran's favor."

Petitioner, a Marine veteran, seeks disability benefits for his service-related post-traumatic stress disorder (PTSD). While the Department of Veterans Affairs (VA) agrees that petitioner suffers from service-related PTSD, it has refused to award him retroactive benefits. The VA's decision turns on the meaning of the term "relevant" as used in 38 C.F.R. § 3.156(c)(1).

Below, the Federal Circuit found that petitioner and the VA both offered reasonable constructions of that term. On that basis alone, the court held that the regulation is ambiguous, and—invoking *Auer*—deferred to the VA's interpretation of its own ambiguous regulation. The questions presented are:

1. Whether the Court should overrule *Auer* and *Seminole Rock*.

2. Alternatively, whether *Auer* deference should yield to a substantive canon of construction.

TABLE OF CONTENTS

Page

Questions Presented i
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Regulation Involved 1
Statement 3
A. Legal background 4
B. Factual background and proceedings below. 5
Reasons for Granting the Petition 9
I. The Court Should Overrule *Auer*. 10
A. *Auer*'s viability requires resolution. 10
B. Courts should not defer to an agency's interpretation of its own ambiguous regulation. 15
C. This is a suitable vehicle to revisit *Auer*. 18
II. Alternatively, The Court Should Hold That *Auer* Deference Yields To Substantive Interpretative Canons. 23
A. The circuits are divided regarding the intersection of agency deference and substantive construction canons. 23
B. If *Auer* is maintained, the Court should require agencies to apply the substantive construction canons. 27
Conclusion 29

Appendix A – Federal Circuit panel opinion (Sept. 7, 2017) 1a
Appendix B – Court of Appeals for Veterans Claims opinion (Jan. 27, 2016) 20a
Appendix C – Board of Veterans' Appeals decision (Apr. 29, 2014) 26a
Appendix D – Federal Circuit order denying rehearing en banc and dissent from denial (Jan. 31, 2018) 44a

TABLE OF AUTHORITIES

Page(s)

Cases

Albuquerque Indian Rights v. *Lujan*,
930 F.2d 49 (D.C. Cir. 1991) 24

Auer v. *Robbins*,
519 U.S. 452 (1997) 5, 27

Bible v. *United Student Aid Funds, Inc.*,
807 F.3d 839 (7th Cir. 2015) 12

Boone v. *Lightner*,
319 U.S. 561 (1943) 5

Bowles v. *Seminole Rock & Sand Co.*,
325 U.S. 410 (1945) 5

Brown v. *Gardner*,
513 U.S. 115 (1994) 5

California Valley Miwok Tribe v. *United States*,
515 F.3d 1262 (D.C. Cir. 2008) 25

Christensen v. *Harris Cty.*,
529 U.S. 576 (2000) 11

Christopher v. *SmithKline Beecham Corp.*,
567 U.S. 142 (2012) 12, 16, 27

Cobell v. *Kempthorne*,
455 F.3d 301 (D.C. Cir. 2006) 24

Cobell v. *Norton*,
240 F.3d 1081 (D.C. Cir. 2001) 24

Crandon v. *United States*,
494 U.S. 152 (1990) 28

Decker v. *Northwest Envtl. Def. Ctr.*,
568 U.S. 597 (2013) 11, 18

Diné Citizens Against Ruining Our Env't v. *Jewell*, 2018 WL 1940992 (D.N.M. 2018) 13

Egan v. *Delaware River Port Auth.*, 851 F.3d 263 (3d Cir. 2017) 12

Eisai, Inc. v. *United States Food & Drug Admin.*, 134 F. Supp. 3d 384 (D.D.C. 2015) 13

FCC v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012) 15

Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946) 5

Fitzgerald v. *Barnstable Sch. Comm.*, 555 U.S. 246 (2009) 20, 21

Flytenow, Inc. v. *FAA*, 137 S. Ct. 618 (2017) 19

Free Enter. Fund v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) 14

Garco Constr., Inc. v. *Speer*, 138 S. Ct. 1052 (2018) ..... *passim*

Gonzales v. *Oregon*, 546 U.S. 243 (2006) 11

Goodson v. *OS Rest. Servs., LLC*, 2017 WL 1957079 (M.D. Fla. 2017) 13

Gutierrez-Brizuela v. *Lynch*, 834 F.3d 1142 (10th Cir. 2016) 11

Haynes v. *United States*, 891 F.2d 235 (9th Cir. 1989) 26

Henderson v. *Shinseki*, 562 U.S. 428 (2011) 9, 22

Hodge v. *West*,
155 F.3d 1356 (Fed. Cir. 1998) 5

Hyosung D&P Co. v. *United States*,
137 S. Ct. 1325 (2017) 20

INS v. *Chadha*,
462 U.S. 919 (1983) 14

Johnson v. *Robison*,
415 U.S. 361 (1974) 5

King v. *St. Vincent's Hosp.*,
502 U.S. 215 (1991) 22

Maniilaq Ass'n v. *Burwell*,
170 F. Supp. 3d 243 (D.D.C. 2016) 25

Massachusetts v. *DOT*,
93 F.3d 890 (D.C. Cir. 1996) 24

Muscogee (Creek) Nation v. *Hodel*,
851 F.2d 1439 (D.C. Cir. 1988) 24

Navajo Health Found.-Sage Mem'l Hosp., Inc. v. *Burwell*,
100 F. Supp. 3d 1122 (D.N.M. 2015) 26

Occidental Fire & Cas. Co. of N.C. v. *D'Line Logistics, Inc.*,
2017 WL 6733690 (N.D. Ill. 2017) 13

Oppedisano v. *Holder*,
769 F.3d 147 (2d Cir. 2014) 27

Pacheco-Camacho v. *Hood*,
272 F.3d 1266 (9th Cir. 2001) 27

Pearson v. *Callahan*,
555 U.S. 223 (2009) 18

Pereira v. *Sessions*,
No. 17-459 (2018) 11, 17

Perez v. *Mortgage Bankers*,
135 S. Ct. 1199 (2015) ..... *passim*

Ramah Navajo Chapter v. *Lujan*,
112 F.3d 1455 (10th Cir. 1997) 25

Rancheria v. *Hargan*,
296 F. Supp. 3d 256 (D.D.C. 2017) 23

Regan v. *Taxation with Representation*,
461 U.S. 540 (1983) 5

Seldovia Native Ass'n, Inc. v. *Lujan*,
904 F.2d 1335 (9th Cir. 1990) 26

Southern Ute Indian Tribe v. *Sebelius*,
657 F.3d 1071 (10th Cir. 2011) 26

Talk Am., Inc. v. *Michigan Bell Tel. Co.*,
564 U.S. 50 (2011) 11, 12, 15

Turtle Island Restoration Network v. *United States Dep't of Commerce*,
878 F.3d 725 (9th Cir. 2017) 12

United States v. *McGoff*,
831 F.2d 1071 (D.C. Cir. 1987) 25

United Student Aid Funds, Inc. v. *Bible*,
136 S. Ct. 1607 (2016) 10, 19

Yi v. *Federal Bureau of Prisons*,
412 F.3d 526 (4th Cir. 2005) 27

Zivotofsky ex rel. Zivotofsky v. *Clinton*,
566 U.S. 189 (2012) 20

Rules and Regulations

Federal Rule of Evidence 401 22

38 C.F.R.
§ 3.156 ..... *passim*
§ 3.156(a) 4, 22
§ 3.156(c)(1) 4, 21
§ 3.156(c)(3) 4
§ 3.400(q) 4

Other Authorities

Christopher J. Walker, Chevron *Inside The Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703 (2014) 14

Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 Colum. L. Rev. 771 (1975) 17

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 13, 14

Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461 (2003) 16

Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner James L. Kisor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit panel opinion (App., *infra*, 1a-19a) is reported at 869 F.3d 1360. The decision of the Court of Appeals for Veterans Claims (App., *infra*, 20a-25a) is unreported but available at 2016 WL 337517. The order of the Federal Circuit denying panel rehearing and rehearing en banc and the dissent from such denial (App., *infra*, 44a-54a) are reported at 880 F.3d 1378.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2017. A petition for rehearing was denied on January 31, 2018. On April 24, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018. See *Kisor* v. *Wilkie*, No. 17a1154. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

REGULATION INVOLVED

The Department of Veterans Affairs' New and Material Evidence regulation, 38 C.F.R. § 3.156, provides:

> (a) General. A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or

when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

* * *

(c) Service department records.

(1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

* * *

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the

previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

STATEMENT

This case is an attractive vehicle for the Court to reconsider a significant and recurring issue at the heart of administrative law: how much deference courts should afford an agency's interpretation of its own ambiguous regulation. That question was the only one decided below, and whether and how *Auer* deference applies is outcome-determinative here.

This case concerns the Department of Veterans Affairs' (VA) construction of its own regulation regarding veteran disability benefits. In particular, the dispute centers on the meaning of the term "relevant." The court of appeals expressly acknowledged that both petitioner and the VA advanced reasonable but irreconcilable constructions of the regulation. On that basis alone, the court found the regulation ambiguous. It then held that *Auer* resolves the case in the VA's favor.

The Court should grant review to overrule *Auer* deference in its entirety. Alternatively, the Court should conclude that *Auer* deference yields to substantive canons of construction—here, the canon that compels courts to construe ambiguities in veterans' benefit laws in the veteran's favor. The Court should then remand to allow the court of appeals to consider, in the first instance, the proper construction of the regulation at issue.

A. Legal background

1. The United States, through the VA, provides disability compensation to veterans who suffer injuries resulting from their service. The VA administers a claims-processing system for adjudicating veterans' claims. See, *e.g.*, 38 C.F.R. §§ 3.1 to 3.1010.

After the time for an appeal has elapsed, VA regulations provide two principal mechanisms by which a veteran can seek review of a previously denied claim. First, 38 C.F.R. § 3.156(a) allows a claimant to "reopen" a denial by "submitting new and material evidence." When a veteran obtains relief pursuant to this subsection, the benefits become effective on the date the application to reopen was filed. *Id.* § 3.400(q).

Second, 38 C.F.R. § 3.156(c)(1) authorizes the VA to "reconsider" a previously denied claim in the event that the "VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." The regulation specifies that "[s]uch records include, but are not limited to" "[s]ervice records that are related to a claimed in-service event, injury, or disease." *Ibid.*

Section 3.156(c)(1) therefore applies when, at the time of the VA's original decision, "relevant" documents existed but the VA failed to consider them. This provision is more favorable to veterans because it provides for a retroactive effective date for any benefits awarded. *Id.* § 3.156(c)(3) (providing that the effective date for any such award is "the date entitlement arose or the date VA received the previously decided claim, whichever is later").

2. This Court has long recognized that "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943)). Veterans have "been obliged to drop their own affairs and take up the burdens of the nation" (*Boone*, 319 U.S. at 575), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service" (*Johnson* v. *Robison*, 415 U.S. 361, 380 (1974)). Accordingly, "our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). For this reason, interpretative ambiguities in veterans' benefit programs are resolved in favor of the beneficiaries. See, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); *Hodge* v. *West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998) (use of canon in construing regulations).

3. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Court held that, in the face of an ambiguous regulation, "the ultimate criterion" is "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Subsequently, in *Auer* v. *Robbins*, 519 U.S. 452, 463 (1997), the Court confirmed the broad deference due an agency's interpretation of its own ambiguous regulation.

B. Factual background and proceedings below.

Petitioner James Kisor served in the Marines during the Vietnam War. App., *infra*, 2a. In particular, he participated in Operation Harvest Moon. *Id.*

at 3a. During a search operation with his company, he came under attack by sniper fire and mortar rounds. *Ibid.* One major ambush left 13 fellow soldiers dead. *Ibid.*

1. In 1982, petitioner filed a claim with the VA for service-connected disability benefits, asserting that he suffered from post-traumatic stress disorder (PTSD). App., *infra*, 2a.

In support of this claim, petitioner included a letter from a counselor at the Portland Vet Center; the letter indicated that petitioner's symptoms of "depression, suicidal thoughts, and social withdraw[a]l" were "associated with the diagnosis of Post-Traumatic Stress Disorder." App., *infra*, 2a-3a. But a subsequent psychiatric examination suggested that petitioner suffered from "a personality disorder as opposed to PTSD." *Id.* at 3a. Ultimately, the VA denied petitioner's claim for benefits in May 1983, finding insufficient proof that he suffered from PTSD. *Ibid.*

2. In June 2006, petitioner sought review of his previously denied claim. App., *infra*, 4a. The VA granted petitioner relief, finding that he is disabled as a result of service-connected PTSD. *Id.* at 26a-43a.

In requesting relief, petitioner identified materials that existed at the time of the 1983 denial but that had not been associated with his file. App., *infra*, 4a. This included petitioner's Department of Defense Form 214, as well as his Combat History, Expeditions, and Awards Record. *Ibid.* This material "document[ed] his participation in Operation Harvest Moon." *Ibid.*

The VA granted relief pursuant to Section 3.156(a), not Section 3.156(c). App., *infra*, 4a. As a

result, the effective date of petitioner's benefits is June 5, 2006—not the 1983 effective date that he requested. *Id.* at 4a, 6a.

The VA (through the Board of Veterans' Appeals) reached this result because it found that petitioner's Form 214 and the Combat History document did not qualify as "relevant" for purposes of Section 3.156(c)(1). App., *infra*, 42a. The Board reasoned that this material did not "suggest or better yet establish that [petitioner] has PTSD as a current disability." *Ibid.* In the Board's view, records are not "relevant" when they are not "outcome determinative in that they do not manifestly change the outcome of the decision." *Id.* at 42a-43a.

3. The Court of Appeals for Veterans Claims affirmed. App., *infra*, 20a-25a. It restated the Board's conclusion that petitioner's "documents were not outcome determinative," and thus they did not qualify as "relevant" within the meaning of the regulation. *Id.* at 24a.

4. The Federal Circuit affirmed. App., *infra*, 1a-19a. It acknowledged that "the heart of this appeal" is petitioner's "challenge to the VA's interpretation of the term 'relevant.'" *Id.* at 14a-15a.

The Federal Circuit concluded that both parties offered reasonable constructions of the term "relevant" as used in Section 3.156(c)(1). App., *infra*, 17a. Petitioner, the court recognized, argued that material is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable." *Id.* at 16a. In petitioner's view, the documents he provided are relevant because they "speak to the pres-

ence of an in service stressor, one of the requirements of compensation for an alleged service-connected industry." *Ibid.* The VA, by contrast, defended the Board's narrower construction of "relevant." *Id.* at 16a-17a.

The court of appeals held that "a regulation is ambiguous on its face when competing definitions for a disputed term seem reasonable." App., *infra*, 17a (quotation omitted). Here, because "neither party's position" struck the court "as unreasonable," it "conclude[d] that the term 'relevant' in [Section] 3.156(c)(1) is ambiguous." *Ibid.* The court found "[s]ignificant[]" that "[Section] 3.156(c)(1) does not specify whether 'relevant' records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard." *Id.* at 15a. "This uncertainty in application suggests that the regulation is ambiguous." *Ibid.*

The court's conclusion that the regulation is ambiguous led it to apply *Auer* deference. Quoting *Auer*, the court explained that "[a]n agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." App., *infra*, 15a. Because the court viewed Section 3.156(c)(1) as "ambiguous," "the only remaining question is whether the [VA's] interpretation of the regulation is 'plainly erroneous or inconsistent' with the VA's regulatory framework." *Id.* at 17a. Based solely on this deference, the court affirmed the VA's construction of the regulation and, accordingly, affirmed the VA's denial of retroactive benefits. *Id.* at 17a-19a.

5. The court of appeals denied rehearing en banc (App., *infra*, 44a-46a) over a three-judge dissent (*id.* at 47a-54a).

The dissent first noted the repeated calls to abandon *Auer* by Members of this Court, circuit court judges, and academics. App., *infra*, 48a-49a. The dissenting judges nonetheless recognized that the lower courts have "no authority to reconsider *Auer*, of course." *Id.* at 49a.

Instead, the dissenting judges would have narrowed *Auer*, holding it inapplicable in these circumstances. In the dissent's view, the panel erred by failing to properly reconcile *Auer* with "the longstanding 'canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" App., *infra*, 50a (quoting *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011)). "If only one of these doctrines can prevail in a given case, the pro-veteran canon must overcome *Auer*." *Id.* at 51a. That is because *Auer* applies only when, after using the normal tools of statutory construction, a regulation remains ambiguous. *Ibid.* And "[t]he rule that interpretative doubt is to be resolved in the veteran's favor is one of those rules of statutory construction." *Ibid.* (quotation omitted). Thus, "[a] regulation cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible." *Ibid.*

REASONS FOR GRANTING THE PETITION

Members of the Court have repeatedly stressed the need to revisit *Auer*. This case is an appropriate vehicle for doing so: because *Auer* was the sole basis for decision in the court of appeals, this case cleanly

presents the *Auer* question. Given the persistent confusion about *Auer*'s continued vitality manifest in the lower courts, review is warranted.

Alternatively, the Court should grant review to further narrow *Auer*. The lower courts are intractably divided as to the intersection of agency deference doctrines and substantive construction canons. At the very least, the Court should hold—as the dissenting judges below urged—that *Auer* yields to these interpretative tools.

I. The Court Should Overrule *Auer*.

The Court should definitively resolve whether courts must defer to an agency's interpretation of its own ambiguous regulation. Not only is the question of *Auer* deference important in its own right, but the frequent criticism of *Auer* deference by Members of this Court has caused substantial confusion in the lower courts. Ultimately, the Court should abandon *Auer*. And this case is a suitable vehicle for doing so.

A. *Auer*'s viability requires resolution.

1. As Justice Thomas recently observed, "[s]everal Members of this Court have said that [*Auer*] merits reconsideration in an appropriate case." *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from the denial of certiorari). Indeed, "[b]y all accounts, *Seminole Rock* deference is 'on its last gasp.'" *Ibid.* (quoting *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari)).

The criticism of *Auer* has been repeated and sustained. See, *e.g.*, *Perez* v. *Mortgage Bankers*, 135 S. Ct. 1199, 1210-1211 (2015) (Alito, J., concurring in

part and concurring in the judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect."); *id.* at 1213 (Scalia, J., concurring in the judgment) (urging the Court to "abandon[] *Auer*"); *id.* at 1224 (Thomas, J., concurring in the judgment) ("By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."); *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 615-616 (2013) (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer*] in an appropriate case.").

More recently, Justice Kennedy observed that existing doctrines of agency deference warrant reconsideration. See *Pereira* v. *Sessions*, No. 17-459 (2018), slip op. 2-3 (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron*."). See also *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today's administrative agencies would have warranted less deference from other branches, not more."). Revisiting *Auer* deference is an appropriate place to begin.

Beyond criticizing *Auer*, the Court has substantially chipped away at it, continuously narrowing its scope. See *Christensen* v. *Harris Cty.*, 529 U.S. 576, 588 (2000) (holding that *Auer* does not apply where the agency's regulation is unambiguous); *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* does not apply where the regulation merely paraphrases statutory language); *Talk Am., Inc.* v. *Mich-*

igan Bell Tel. Co., 564 U.S. 50, 63-64 (2011) (signaling that *Auer* prohibits agencies from issuing a de facto new regulation); *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155-156 (2012) (holding that *Auer* does not apply to an agency's "interpretation of ambiguous regulations [that would] impose potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation was announced").

2. It is no surprise, then, that widespread confusion persists in the lower courts. While, as here (see, *e.g.*, App., *infra*, 49a), lower courts generally acknowledge that *Auer* remains binding in theory, its uncertain status casts a shadow over the doctrine when invoked. Whatever the Court may ultimately conclude, it is important to bring certainty to this fundamental question of administrative law.

In *Bible* v. *United Student Aid Funds, Inc.*, 807 F.3d 839 (7th Cir. 2015), for example, Judge Easterbrook voted against rehearing en banc because it would not "be a prudent use of this court's resources to have all nine judges consider how *Auer* applies to rehabilitation agreements, when *Auer* may not be long for this world." *Id.* at 841 (Easterbrook, J., concurring in the denial of rehearing en banc). See also *Egan* v. *Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) ("The problems [*Auer* and *Chevron*] create are serious and ought to be fixed."); *Turtle Island Restoration Network* v. *United States Dep't of Commerce*, 878 F.3d 725, 742 n.1 (9th Cir. 2017) (Callahan, J., dissenting in part) ("*Auer*'s continued vitality is a matter of considerable debate.").

When *Auer* is invoked as a rule of decision, courts repeatedly attach an asterisk to opinions, ex-

pressly noting that their reasoning rests on *Auer*'s potentially faulty premise. See, *e.g.*, *Diné Citizens Against Ruining Our Env't* v. *Jewell*, 2018 WL 1940992, at *26 & n.16 (D.N.M. 2018) (noting that "[a]lthough the Court shares Justice Scalia's concerns about *Auer* deference, it is, for the time being, the law of the land, and, as a federal district court, the Court must apply it"); *Occidental Fire & Cas. Co. of N.C.* v. *D'Line Logistics, Inc.*, 2017 WL 6733690, at *4 (N.D. Ill. 2017) ("[T]he court acknowledges that the validity of the *Auer* doctrine has been questioned in recent years."); *Goodson* v. *OS Rest. Servs., LLC*, 2017 WL 1957079, at *6 n.20 (M.D. Fla. 2017) (although Justice Scalia "[p]ersuasively argu[ed] that *Auer* Deference should be abandoned," "this Court remains obligated to defer to administrative pronouncements under *Auer*"); *Eisai, Inc.* v. *United States Food & Drug Admin.*, 134 F. Supp. 3d 384, 394 n.2 (D.D.C. 2015) ("*Auer* has been the target of skepticism in recent years. * * * This Court, however, is bound to follow *Auer* unless and until the Supreme Court modifies the relevant standard.").

It makes little sense for the lower courts to labor under this cloud of uncertainty. The Court should provide concrete guidance.

3. Certiorari is additionally warranted because the doctrine is important. If, as we maintain, *Auer* is wrong, it is imperative that the Court correct it.

The growth of the administrative state has compounded *Auer*'s practical implications. "Because agency rules that comply with specified procedural formalities bind with the force of statutes, *Seminole Rock* has a significant impact on the public's legal rights and obligations." John F. Manning, *Constitutional Structure and Judicial Deference to Agency In-*

terpretations of Agency Rules, 96 Colum. L. Rev. 612, 615 (1996). Indeed, the administrative state "wields vast power and touches almost every aspect of daily life." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). See also *INS* v. *Chadha*, 462 U.S. 919, 985-986 (1983) (White, J., dissenting) ("For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the law-making engaged in by Congress.").

The *Auer* exemption for interpretive rulemaking "was meant to be more modest in its effects than it is today." *Mortgage Bankers*, 135 S. Ct. at 1211 (Scalia, J.). The literature has shown that agencies are well aware of *Auer* deference and concede that it plays a role in their drafting of regulations. See, *e.g.*, Christopher J. Walker, Chevron *Inside The Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703, 715-716 (2014) (almost 40 percent of rule drafters surveyed indicated that *Auer* specifically played a role in the drafting of regulations).

Auer "removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean * * *, the agency bears little, if any, risk of its own opacity or imprecision." Manning, *supra*, at 655. Instead of promoting clarity and precision, *Auer* incentivizes agencies to promulgate vague and broad regulations, which they can later clarify through interpretive rules that are not subject to notice-and-comment procedures. See *ibid.* *Auer* is thus a doctrine that requires this Court's careful review.

B. Courts should not defer to an agency's interpretation of its own ambiguous regulation.

Auer deference is a judicially created tool that guides the construction of agency regulations. It does not rest on any constitutional or legislative footing. The Court should not hesitate to revisit and abandon *Auer* and *Seminole Rock*.

1. *Auer* deference is incompatible with due process, the "fundamental principle in our legal system * * * that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

Auer deference provides agencies an end-run around the notice-and-comment procedures required by the Administrative Procedure Act (APA), allowing agencies to skirt this fundamental legal constraint. "The [APA] contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Mortgage Bankers*, 135 S. Ct. at 1211 (Scalia, J.). But *Auer* deference "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Garco*, 138 S. Ct. at 1053 (Thomas, J.) (quoting *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring)).

Indeed, extending deference to informal agency interpretations "allows the agency to control the extent of its notice-and-comment-free domain." *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J.). The implications are obvious and oft-observed: "To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of

gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Ibid.*

As Judge O'Malley observed below, "*Auer* 'encourag[es] agencies to write ambiguous regulations and interpret them later,' which 'defeats the purpose of delegation,' 'undermines the rule of law,' and ultimately allows agencies to circumvent the notice-and-comment rulemaking process." App., *infra*, 49a (quoting Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 551-552 (2003)). See also *SmithKline Beecham Corp.*, 567 U.S. at 158 (observing the "risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking").

2. *Auer* also "raises two related constitutional concerns" respecting the separation of powers. *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.).

First, *Auer* "represents a transfer of judicial power to the Executive Branch." *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.). The Constitution vests the judicial power of the United States with the judiciary, which requires the exercise of "independent judgment." *Ibid.* But, "[b]ecause the agency is * * * not properly constituted to exercise the judicial power under the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns." *Id.* at 1219-1220. See also *Garco*, 138 S. Ct. at 1052-1053 (Thomas, J.) ("[*Auer*] undermines 'the judicial check on the political branches' by ceding the courts' authority to independently interpret and apply legal texts.").

As Justice Kennedy recently explained, agency deference "suggests an abdication of the Judiciary's proper role in interpreting federal statutes. The type of reflexive deference exhibited in some of these cases is troubling." *Pereira*, No. 17-459, slip op. 2 (Kennedy, J.). "The proper rules for interpreting [regulations] and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Id.* at 3.

The Federal Circuit here exhibited extraordinary and troubling judicial deference: the mere identification of two plausible, competing interpretations was the sole reason that the agency prevailed. App., *infra*, 17a. The court of appeals wholly abdicated its constitutional mandate to exercise independent judgment; it effectively delegated to the VA its authority to interpret legal texts. This is perhaps the quintessential example of a case in which judicial review has "no more substance at the core than a seedless grape." Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 Colum. L. Rev. 771, 780 (1975).

Not only is *Auer* constitutionally suspect insofar as it strips power from the courts, but it also rests on faulty reasoning. Although agencies may be "better equipped than the courts" to make policy decisions, an agency "is no better equipped to read legal texts." *Garco*, 138 S. Ct. at 1053 (Thomas, J.). See also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 397 (1986).

Second, *Auer* "amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J.). "When courts refuse even to decide

what the best interpretation is under the law, they abandon the judicial check." *Id.* at 1221. That is, "*Auer* deference * * * contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part). It is dangerous to "eliminat[e] the separation between the entity that creates the law and the one that interprets it." App., *infra*, 49a. In sum, *Auer* "results in an 'accumulation of governmental powers' by allowing the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion.'" *Garco*, 138 S. Ct. at 1052-1053 (Thomas, J.).

3. *Stare decisis* is no reason to retain *Auer* deference. To begin with, *stare decisis* likely does not apply at all, as *Auer* is merely an interpretative tool. *Mortgage Bankers*, 135 S. Ct. at 1214 n.1 (Thomas, J.). Moreover, *stare decisis* has minimal effect when, as here, there is no expectancy interest by the public in a judge-made rule concerning judicial procedure. In *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009), the Court did not hesitate to revisit the "judge made" rule of sequential decision making in the qualified immunity context, because that "protocol does not affect the way in which parties order their affairs" and thus reversing precedent "would not upset settled expectations on anyone's part." And, as in *Pearson*, "Members of this Court have also voiced criticism" of the underlying rule, as have "[l]ower court judges" bound to apply it. *Id.* at 234-235.

C. This is a suitable vehicle to revisit *Auer*.

1. This case cleanly presents *Auer* deference in its most extreme form. To begin with, the sole basis of decision articulated by the court of appeals was

that the presence of two competing, reasonable constructions of the regulation obligated the court to declare the regulation "ambiguous." App., *infra*, 15a-17a. The court merely observed that "neither party's position strikes us as unreasonable." *Id.* at 17a. That is all it takes for *Auer* to apply: a "regulation is ambiguous on its face" whenever "competing definitions for a disputed term seem reasonable." *Ibid.* (quotation omitted). The panel did not offer an ounce of independent analysis as to the interpretative dispute. See *ibid.*

The decision below thus hangs entirely on the *Auer* doctrine. There is no factual dispute, nor did the panel identify any alternative ground for its holding.

This case is therefore unlike other recent petitions addressing *Auer*. In *United Student Aid Funds*, for example, the regulation was likely unambiguous. See Br. in Opp'n at 14-16, *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607 (2016) (No. 15-861). See also Br. in Opp'n at 16, *Flytenow, Inc.* v. *FAA*, 137 S. Ct. 618 (2017) (No. 16-14) ("[E]ven without such deference, [the court] had no difficulty upholding the FAA's interpretation of its regulations."). Here, however, the court of appeals' decision rests on an express finding of ambiguity.

What is more, the VA is a *party* to this litigation; in the Federal Circuit's view, the VA's *own* position—formulated during the adjudication of petitioner's claim—is decisive. The Court should be especially skeptical of *Auer* deference when an agency invokes it to resolve an adversarial proceeding in its own favor. *Auer* certainly should have no effect when the interpretation at issue advances the agency's fiscal self-interest.

Nor does this case possess any sort of vehicle defect that would preclude the Court from reaching the heart of *Auer*. In *Garco Construction*, the government opposed review in part because the regulation being construed was not itself the product of notice-and-comment procedures—and thus it did not pose a core *Auer* question. See, *e.g.*, Br. in Opp'n at 16-17, *Garco Constr. Co.* v. *Speer*, 138 S. Ct. 1052 (2017) (No. 17-225). The regulation here, 38 C.F.R. § 3.156(c)(1), was duly adopted pursuant to the APA, and thus all the concerns about an agency end-run around notice and comment apply.

There has been no policy change, moreover, that would render the underlying issue moot or unimportant. See *Garco* Br. in Opp'n at 18 (the outcome of the dispute would have "no ongoing effect on the Air Force's authority"). See also Br. in Opp'n at 19-20, *Hyosung D&P Co.* v. *United States*, 137 S. Ct. 1325 (2017) (No. 16-141). And this case does not involve any special consideration—like deference to questions of military affairs—that would complicate review of *Auer*. Cf. *Garco*, 138 S. Ct. at 1053 (Thomas, J.) (acknowledging that "the military receives substantial deference on matters of policy").

2. Review is also warranted because, under de novo review of the regulation, petitioner is substantially likely to prevail. To be sure, the proper course is for the Court to resolve the sole legal issue that governed below—*Auer* deference—and then remand for application of the proper standard to the particulars of this case. When the Court "reverse[s] on a threshold question," it "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). See also *Fitz-*

gerald v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) ("Ordinarily, 'we do not decide in the first instance issues not decided below.'"). It nonetheless bears mention that petitioner is very likely to prevail under the proper standard.

In petitioner's view, material is "relevant" for purposes of Section 3.156(c)(1) if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable." App., *infra*, 13a. See also *id.* at 16a. That is to say, documents are "relevant" if they matter to the VA's decision whether to grant benefits. Because the documents at issue here "speak to the presence of an in service stressor, one of the requirements of compensation for an alleged service-connected industry," they are "relevant" as petitioner construes the regulation. *Id.* at 16a.

The VA, by contrast, advances a far narrower construction of "relevant." In the VA's view, the issue is not whether the documents are relevant to the VA's overall decision whether to grant a veteran benefits; instead, documents are "relevant" only if they directly bear on what was "in issue" during the VA's earlier decision to deny benefits. App., *infra*, 16a-17a.

For multiple reasons, petitioner offers the better construction. *First*, the regulation itself identifies that "relevant official service department records" include "records that are related to a claimed in-service event" or "injury." 38 C.F.R. § 3.156(c)(1). The materials at issue were relied on by the VA precisely because they are "related to a claimed in-service event" or "injury." The VA's narrower definition of "relevant" is therefore inconsistent with the text of Section 3.156(c)(1).

Second, the VA's construction of the term "relevant" renders it indistinguishable from "material," which Section 3.156(a) expressly defines as "evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." If the VA had actually meant for Section 3.156(c)(1) to apply only to "material" evidence, it would have used that word.

Third, "relevant" is a legal term of art. Federal Rule of Evidence 401, for example, defines "relevant" as "any tendency to make a fact more or less probable" when the "fact is of consequence in determining the action." Whether petitioner's PTSD is attributable to an in-service stressor is undeniably a fact "of consequence in determining the action." Thus, the documents petitioner provided are "relevant" for purposes of these proceedings.

Fourth, to the extent that any doubt remains as to the proper construction of the veteran's disability program, ambiguities must be construed in petitioner's favor. The Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)). Indeed, the "solicitude of Congress for veterans is of long standing," which effectively "place[s] a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Id.* at 440 (quotation omitted). To the extent that there are multiple reasonable ways to construe "relevant" as used in Section 3.156(c)(1)—the conclusion reached below (App., *infra*, 15a-17a)—courts are obligated to choose the construction that favors veterans.

II. Alternatively, The Court Should Hold That *Auer* Deference Yields To Substantive Interpretative Canons.

This last point—the intersection of a substantive canon of construction and *Auer* deference—is an issue worthy of review in its own right. The federal courts of appeals are deeply divided on which interpretative tool comes first: a substantive canon of construction or deference to an agency's interpretation. The Court should grant review of this question, and, if it retains *Auer*, it should hold that deference to an agency is proper only after all other applicable canons have failed to resolve latent ambiguities.

A. The circuits are divided regarding the intersection of agency deference and substantive construction canons.

As Judge O'Malley's opinion dissenting from the denial of rehearing explained below, the question of whether a substantive canon of construction comes before or after agency deference doctrines is an important issue that has divided the circuits. App., *infra*, 50a-52a ("In a case like this one, where the agency's interpretation of an ambiguous regulation and a more veteran-friendly interpretation are in conflict, it is unclear from [this Court's] precedent which interpretation should control."). Indeed, courts have acknowledged the circuit "split on which canon controls" in these circumstances. *Rancheria* v. *Hargan*, 296 F. Supp. 3d 256, 266 (D.D.C. 2017).

1. Several courts of appeals hold that substantive canons of construction should be applied *prior* to resorting to agency deference.

As the dissent below identified (App., *infra*, 52a), the D.C. Circuit holds that substantive interpreta-

tive tools trump agency deference doctrines. In the context of the pro-Indian canon,[1] the D.C. Circuit has held that agency deference—in particular, "*Chevron* deference"—"is not applicable." *Cobell* v. *Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). The pro-Indian canon creates a mechanism to resolve ambiguities, and agencies are not exempt from that doctrine. See *ibid.*

The D.C. Circuit has applied this law with some frequency. See, *e.g.*, *Cobell* v. *Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006) (holding that the "normally-applicable [*Chevron*] deference was trumped by the requirement" to construe statutes "liberally in favor of the Indians"); *Massachusetts* v. *DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996) ("As a result of this presumption, we have rejected agency interpretations of statutes that may have been reasonable in other contexts because the agency interpretation would not favor the Indians."); *Albuquerque Indian Rights* v. *Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) ("Based on the special strength of this canon, we then declined to defer to DOI's interpretation of the governing statute, which had not followed the canon."); *Muscogee (Creek) Nation* v. *Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988) (holding that, because of the pro-Indian canon, "while we have given careful consideration to Interior's interpretation of the [statute], we do not defer to it").

Likewise, the D.C. Circuit applies the rule of lenity prior to agency deference. Because "the law of

---

[1] The pro-Indian canon is closely parallel to the pro-veteran canon. Both are canons of "special strength." Compare App., *infra*, 52a, with *Albuquerque Indian Rights* v. *Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) (the canon of construction favoring Native Americans is one of "special strength").

crimes must be clear," "[t]here is less room in a statute's regime for flexibility, a characteristic so familiar to us on this court in the interpretation of statutes entrusted to agencies for administration." *United States* v. *McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987). In the criminal context, therefore, a court is "far outside *Chevron* territory." *Ibid.*

The D.C. Circuit's reconciliation of agency deference and substantive construction canons necessarily governs in *Auer* cases, too. In *Maniilaq Ass'n* v. *Burwell*, 170 F. Supp. 3d 243 (D.D.C. 2016), the court observed that, in the D.C. Circuit, "courts 'typically do not apply full *Chevron* deference to an agency interpretation of an ambiguous statutory provision involving Indian affairs.'" *Id.* at 248 n.4 (quoting *California Valley Miwok Tribe* v. *United States*, 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008)). On this basis, the court concluded that "[t]here is good reason to believe that the canon trumps *Auer* deference as well." *Ibid.* The court thus applied the pro-Indian canon, rather than *Auer* deference. *Id.* at 247-248.

The **Tenth Circuit** has reached the same result. Expressly following D.C. Circuit precedent, the Tenth Circuit holds that "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997). As a result, "the canon of construction favoring Native Americans necessarily constrains the possible number of reasonable ways to read an ambiguity in the statute." *Ibid.* (alteration and quotation omitted).

The Tenth Circuit's holdings on this point are clear and unambiguous: the pro-Indian "canon of construction controls over more general rules of def-

erence to an agency's interpretation of an ambiguous statute." *Southern Ute Indian Tribe* v. *Sebelius*, 657 F.3d 1071, 1078 (10th Cir. 2011).

As in the D.C. Circuit, courts have concluded that the Tenth Circuit's holding applies equally in the *Auer* context. That is, "Tenth Circuit precedent indicates that courts should not" "apply *Auer* deference to an agency's interpretation of the [statute's] promulgating regulations." *Navajo Health Found.-Sage Mem'l Hosp., Inc.* v. *Burwell*, 100 F. Supp. 3d 1122, 1175 (D.N.M. 2015). While "*Chevron* deference is distinct from *Auer* deference, the Tenth Circuit's rationale for not applying *Chevron* deference to * * * statutory provisions applies with equal force to *Auer* deference." *Ibid.*

2. Other circuits, however, disagree. To begin with, the **Federal Circuit** below applied *Auer*—not the pro-veteran canon—to resolve ambiguity. App., *infra*, 17a. Indeed, the three-judge dissent highlighted that this "case presents an ideal vehicle * * * to consider the reach of *Auer* deference when it comes into conflict with the pro-veteran canon of construction." *Id.* at 54a.

The **Ninth Circuit** likewise holds, in the context of the pro-Indian canon, that agency deference doctrines apply first. The Ninth Circuit has "declined to apply" the pro-Indian canon "in light of competing deference given to an agency charged with the statute's administration." *Haynes* v. *United States*, 891 F.2d 235, 239 (9th Cir. 1989). See also *Seldovia Native Ass'n, Inc.* v. *Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990) (observing that the court "recently rejected the application" of the pro-Indian canon in the context of agency deference).

Similarly, the Ninth Circuit concludes that agency deference applies prior to the rule of lenity. See *Pacheco-Camacho* v. *Hood*, 272 F.3d 1266, 1272 (9th Cir. 2001) ("To the extent that there is any ambiguity * * * , the [agency] has resolved it through a reasonable interpretation, and the rule of lenity does not apply.").

The **Second Circuit** and the **Fourth Circuit** have reached the same result in the lenity context. See *Oppedisano* v. *Holder*, 769 F.3d 147, 153 (2d Cir. 2014) (holding that the rule of lenity "does not trump *Chevron*'s requirement of deference to reasonable interpretations by administrative agencies of statutes for which they are responsible"); *Yi* v. *Federal Bureau of Prisons*, 412 F.3d 526, 535 (4th Cir. 2005) ("Rather than apply a presumption of lenity to resolve the ambiguity, *Chevron* requires that we *defer* to the agency's reasonable construction of the statute.").

B. If *Auer* is maintained, the Court should require agencies to apply the substantive construction canons.

The Court has repeatedly narrowed *Auer* (see pp. 11-12, *supra*) where there exist "strong reasons for withholding the deference that *Auer* generally requires." *SmithKline Beecham Corp.*, 567 U.S. at 155. If *Auer* remains in some fashion, the Court should hold it inapplicable in the face of a substantive canon of construction.

In construing the statutes and regulations that they administer, agencies must use the ordinary tools of construction. *Auer* applies only if, after using those tools, the regulation remains ambiguous. See *Auer*, 519 U.S. at 462-463. There is no basis in law to

exempt agencies from applying substantive canons of construction—such as the veteran's solicitude canon—that govern everywhere else. It would be bizarre indeed if private litigants and courts were obligated to interpret regulations in this manner, but agencies were free to disregard these fundamental principles. To the extent *Auer* remains, it should yield to all other applicable rules of construction.

In his concurrence in *Crandon* v. *United States*, 494 U.S. 152, 177-178 (1990), Justice Scalia explained that agency deference should play little role in the construction of criminal laws, as that would "replac[e] the doctrine of lenity with a doctrine of severity." Rather, as Justice Scalia saw it, the rule of lenity—like all substantive construction canons—should take hold prior to agency deference.

As Judge O'Malley noted below in her dissent, "[w]hatever the logic behind continued adherence to the doctrine espoused in *Auer*—and I see little—there is no logic to its application to regulations promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated." App., *infra*, 48a. Rather, "[w]hen these two doctrines pull in different directions, it is *Auer* deference that must give way." *Ibid.*

This conclusion, moreover, would resolve this case. As Judge O'Malley observed, "[a] regulation cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible." App., *infra*, 51a.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Petitioner

JUNE 2018

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant-Appellant

v.

DAVID J. SHULKIN, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Judge Alan G. Lance, Sr.

Decided: September 7, 2017

KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, argued for claimant-appellant.

IGOR HELMAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BENJAMIN C. MIZER, ROBERT E.

KIRSCHMAN, JR., MARTIN F. HOCKEY, JR.; Y. KEN LEE, SAMANTHA ANN SYVERSON, United States Department of Veterans Affairs, Washington, DC.

Before REYNA, SCHALL, and WALLACH, *Circuit Judges*.

SCHALL, *Circuit Judge*.

James L. Kisor, a veteran, appeals the January 27, 2016 decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") in *Kisor v. McDonald*, No. 14-2811, 2016 WL 337517 (Vet. App. Jan. 27, 2016). In that decision, the Veterans Court affirmed the April 29, 2014 decision of the Board of Veterans' Appeals ("Board") denying Mr. Kisor entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for his post-traumatic stress disorder ("PTSD"). *Kisor*, 2016 WL 337517, at *1. We affirm.

BACKGROUND

I.

The pertinent facts are as follows: Mr. Kisor served on active duty in the Marine Corps from 1962 to 1966. *Id.* In December of 1982, he filed an initial claim for disability compensation benefits for PTSD with the Department of Veterans Affairs ("VA") Regional Office ("RO") in Portland, Oregon. *Id.* Subsequently, in connection with that claim, the RO received a February 1983 letter from David E. Collier, a counselor at the Portland Vet Center. J.A. 17. In his letter, Mr. Collier stated: "[I]nvolvement in group and individual counseling identified . . . concerns that Mr. Kisor had towards depression, suicidal

thoughts, and social withdraw[a]l. This symptomatic pattern has been associated with the diagnosis of Post-Traumatic Stress Disorder (DSM III 309.81)." *Id.*

In March of 1983, the RO obtained a psychiatric examination for Mr. Kisor. In his report, the examiner noted that Mr. Kisor had served in Vietnam; that he had participated in "Operation Harvest Moon"[1]; that he was on a search operation when his company came under attack; that he reported several contacts with snipers and occasional mortar rounds fired into his base of operation; and that he "was involved in one major ambush which resulted in 13 deaths in a large company." J.A. 19–20. The examiner did not diagnose Mr. Kisor as suffering from PTSD, however. Rather, it was the examiner's "distinct impression" that Mr. Kisor suffered from "a personality disorder as opposed to PTSD." J.A. 21. The examiner diagnosed Mr. Kisor with intermittent explosive disorder and atypical personality disorder. *Id.* Such conditions cannot be a basis for service connection. *See* 38 C.F.R. § 4.127.[2] Given the lack of a current diagnosis of PTSD, the RO denied Mr. Kisor's claim in May of 1983. J.A. 23. The RO decision became final after Mr. Kisor initiated, but then failed to perfect, an appeal. *Kisor*, 2016 WL 337517, at *1.

---

[1] Operation Harvest Moon was a military engagement against the Viet Cong during the Vietnam War. *See, e.g.*, J.A. 20, 95, 101.

[2] Under § 4.127, "[i]ntellectual disability (intellectual developmental disorder) and personality disorders are not diseases or injuries for compensation purposes, and . . . disability resulting from them may not be service-connected."

II.

On June 5, 2006, Mr. Kisor submitted a request to reopen his previously denied claim for service connection for PTSD. J.A. 25. While his request was pending, he presented evidence to the RO. This evidence included a July 20, 2007 report of a psychiatric evaluation diagnosing PTSD. *See* J.A. 100–11. It also included a copy of Mr. Kisor's Department of Defense Form 214, a Combat History, Expeditions, and Awards Record documenting his participation in Operation Harvest Moon, and a copy of the February 1983 letter from the Portland Vet Center. *See* J.A. 16–17, 27–28. In September of 2007, a VA examiner diagnosed Mr. Kisor with PTSD. J.A. 115. The RO subsequently made a Formal Finding of Information Required to Document the Claimed Stressor based on Mr. Kisor's statements, his service medical records (which verified his service in Vietnam with the 2nd Battalion, 7th Marines), and a daily log from his unit, which detailed the combat events Mr. Kisor had described in connection with his claim. J.A. 30.

In due course, the RO issued a rating decision reopening Mr. Kisor's previously denied claim. The decision granted Mr. Kisor service connection for PTSD and assigned a 50 percent disability rating, effective June 5, 2006.[3] *Kisor*, 2016 WL 337517, at *1.

---

[3] Pursuant to 38 C.F.R. § 3.156(a), a claim may be reopened on the submission of "new and material" evidence. The regulation defines "new" evidence as "existing evidence not previously submitted to agency decisionmakers." 38 C.F.R. § 3.156(a). It defines "material" evidence as "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." *Id.* If a previously denied claim (such as Mr. Kisor's PTSD claim) is later reopened and granted based on the submission of new and

According to the decision, the rating was based upon evidence that included the July 2007 psychiatric evaluation report diagnosing PTSD, the September 2007 VA examination, and the Formal Finding of Information Required to Document the Claimed Stressor. J.A. 32–33. The RO explained that service connection was warranted because the VA examination showed that Mr. Kisor was diagnosed with PTSD due to experiences that occurred in Vietnam and because the record showed that he was "a combat veteran (Combat Action Ribbon recipient)." J.A. 33.

In November of 2007, Mr. Kisor filed a Notice of Disagreement. In it, he challenged both the 50 percent disability rating and the effective date assigned by the RO. *Kisor*, 2016 WL 337517, at *1. Subsequently, in March of 2009, the RO issued a decision increasing Mr. Kisor's schedular rating to 70 percent. In addition, the RO granted a 100 percent rating on an extraschedular basis, effective June 5, 2006.[4] J.A. 41–45. In January of 2010, the RO issued a State-

---

material evidence, the effective date of benefits is the date that the claimant filed the application to reopen or the date entitlement arose, whichever is later. *See* 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(q)(2). In this case, under the new and material evidence approach, the effective date for benefits would be June 5, 2006—the date of Mr. Kisor's request to reopen his claim. J.A. 25.

[4] The VA evaluates a veteran's disability level by using diagnostic codes in the rating schedule of title 38 of the Code of Federal Regulations. *See* 38 C.F.R. § 3.321(a); *see generally* 38 C.F.R. §§ 4.40–4.150 (rating schedule). The evaluation reflects a veteran's base, "schedular" rating. *See Thun v. Peake*, 22 Vet. App. 111, 114 (2008). In exceptional cases, where the schedular rating is inadequate, the veteran is eligible for a higher, "extraschedular" disability rating. *See* 38 C.F.R. § 3.321(b)(1); *Thun*, 22 Vet. App. at 114–15.

ment of the Case denying entitlement to an earlier effective date for the grant of service connection for PTSD. *See* J.A. 53–65.

III.

Mr. Kisor appealed to the Board. Before the Board, he contended that he was entitled to an effective date earlier than June 5, 2006 for the grant of service connection for PTSD. Specifically, he argued that the proper effective date for his claim was the date of his initial claim for disability compensation that was denied in May of 1983. *See* J.A. 47–48. In support, Mr. Kisor alleged clear and unmistakable error (CUE) in the May 1983 rating decision; he also alleged various duty-to-assist failures on the part of the VA. *See* J.A. 47–48, 84–87.

The Board rejected these arguments. It ruled that the duty to assist had not been violated, that Mr. Kisor had failed to establish CUE, and that the RO's May 1983 rating decision became final when Mr. Kisor failed to perfect his appeal of the decision. *See* J.A. 85–88. The Board found no reason to upset the finality of the May 1983 decision because "[t]he remedy available to the Veteran was to appeal," but he did not do so. J.A. 86.

The Board, however, raised "another way to challenge the May 1983 rating decision" that had not been advanced by Mr. Kisor. J.A. 88. That way turned on whether Mr. Kisor was eligible for an earlier effective date for his service connection under the regulation set forth at 38 C.F.R. § 3.156(c). In contrast to 38 C.F.R. § 3.156(a), which only permits claims to be reopened on the submission of "new and material" evidence, § 3.156(c) allows claims to be reconsidered if certain conditions are met. *See*

38 C.F.R. § 3.156(c)(1) (noting that § 3.156(c) applies "notwithstanding paragraph (a)").

Subsection 3.156(c) includes two parts relevant to this appeal. *First*, paragraph (c)(1) defines the circumstances under which the VA must reconsider a veteran's claim for benefits based on newly-associated service department records:

> [A]t any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim . . . .

38 C.F.R. § 3.156(c)(1). *Second*, paragraph (c)(3) establishes the effective date for any benefits granted as a result of reconsideration under paragraph (c)(1):

> An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date the VA received the previously decided claim, whichever is later, ...

38 C.F.R. § 3.156(c)(3).

Section 3.156(c) thus provides for an effective date for claims that are reconsidered that is different from the effective date for claims that are reopened. As we pointed out in *Blubaugh v. McDonald*, "[i]n contrast to the general rule, § 3.156(c) requires the VA to reconsider a veteran's claim when relevant service department records are newly associated with the veteran's claims file, whether or not they are 'new and material' under § 3.156(a)." 773 F.3d 1310, 1313 (Fed. Cir. 2014) (citing New and Material

Evidence, 70 Fed. Reg. 35,388, 35,388 (June 20, 2005)). "In other words," we observed, "§ 3.156(c) serves to place a veteran in the position he would have been in had the VA considered the relevant service department record before the disposition of his earlier claim." *Id.*

Applying the regulation, the Board considered whether the material Mr. Kisor submitted in connection with his June 2006 request to reopen warranted reconsideration of his claim.[5] If it did, then Mr. Kisor would have been eligible for an effective date of December of 1982 for his disability benefits, "the date the VA received the previously decided claim." 38 C.F.R. § 3.156(c)(3).

After reviewing the evidence, the Board denied Mr. Kisor entitlement to an effective date earlier than June 5, 2006. J.A. 91. The Board found that the VA did receive service department records documenting Mr. Kisor's participation in Operation Harvest Moon after the May 1983 rating decision. J.A. 89–90. The Board concluded, though, that the records were not "relevant" for purposes of § 3.156(c)(1). J.A. 90. The Board explained that the 1983 rating decision denied service connection because there was no diagnosis of PTSD, and because service connection can be granted only if there is a current disability.[6] *Id.*

---

[5] The newly-submitted material related to Mr. Kisor's Marine Corps service in Vietnam, including his participation in Operation Harvest Moon. J.A. 94–97. These records had not been part of Mr. Kisor's claims file in May of 1983 when the RO first denied his claim.

[6] Service connection for PTSD requires (1) a medical diagnosis of the condition, (2) a medically established link between current symptoms and an in-service stressor, and (3) credible evidence showing that the in-service stressor occurred. *See*

(citing *Brammer v. Derwinski*, 3 Vet. App. 223 (1992)). The Board stated that "relevant evidence, whether service department records or otherwise, received after the rating decision would suggest or better yet establish that the Veteran has PTSD as a current disability." *Id.* The Board noted that Mr. Kisor's "service personnel records and the daily log skip this antecedent to address the next service connection requirement of a traumatic event during service." *Id.* Finally, the Board concluded with the observation that the records at issue were not "outcome determinative" and "not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat with the enemy during service." J.A. 90–91.

Mr. Kisor appealed the Board's decision to the Veterans Court. There, he argued that the Board had "failed to consider and apply the provisions of 38 C.F.R. § 3.156(c)."[7] *Kisor*, 2016 WL 337517, at *1. The court rejected the argument. The court noted that Mr. Kisor did not argue that the service department records presented after the May 1983 rating decision contained a diagnosis of PTSD, the ab-

---

38 C.F.R. § 3.304(f); *Golz v. Shinseki*, 590 F.3d 1317, 1321–22 (Fed. Cir. 2010).

[7] Mr. Kisor's appeal to the Veterans Court focused solely on the Board's purported misinterpretation of 38 C.F.R. § 3.156(c)(1). Mr. Kisor did not pursue his CUE or duty-to-assist claims before the Veterans Court, and he has not raised them before us. We therefore consider them waived. *See, e.g.*, *Emenaker v. Peake*, 551 F.3d 1332, 1337 (Fed. Cir. 2008) (considering an argument waived on appeal when it was not timely presented to the Veterans Court); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("[A]rguments not raised in the opening brief are waived.").

sence of such a diagnosis having been the basis for the RO's 1983 rating decision. *Id.* at *2. The Veterans Court stated that it was "not persuaded that the Board incorrectly applied § 3.156." *Id.* at *3. Accordingly, it held that Mr. Kisor had "failed to demonstrate error in the Board's findings that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD." *Id.* Mr. Kisor timely appealed the Veterans Court's decision.

DISCUSSION

I.

Section 7292 of title 38 of the United States Code grants us jurisdiction over decisions of the Veterans Court. Section 7292 provides that we "'shall decide all relevant questions of law' arising from appeals from decisions of the Veterans Court, but, '[e]xcept to the extent that an appeal . . . presents a constitutional issue, [we] may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.'" *Sneed v. McDonald*, 819 F.3d 1347, 1350–51 (Fed. Cir. 2016) (quoting 38 U.S.C. § 7292(d)(1)–(2)).

As discussed more fully below, on appeal Mr. Kisor argues that the Veterans Court misinterpreted 38 C.F.R. § 3.156(c)(1). An argument that the Veterans Court misinterpreted a regulation falls within our jurisdiction. *See* 38 U.S.C. § 7292(c) (granting this court "exclusive jurisdiction to review and decide any challenge to the validity of any . . . regulation or any interpretation thereof" by the Veterans Court); *Spicer v. Shinseki*, 752 F.3d 1367, 1369 (Fed. Cir. 2014); *Githens v. Shinseki*, 676 F.3d 1368, 1371 (Fed. Cir. 2012).

We must set aside an interpretation of a regulation that we find to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
>
> (D) without observance of procedure required by law.

38 U.S.C. § 7292(d)(1)(A)–(D); *Sursely v. Peake*, 551 F.3d 1351, 1354 (Fed. Cir. 2009).

II.

Mr. Kisor contends that, in affirming the decision of the Board, the Veterans Court erred in its interpretation of 38 C.F.R. § 3.156(c)(1).[8] As seen, the

---

[8] Mr. Kisor never argued before the Veterans Court that the Board misinterpreted the term "relevant" in § 3.156(c). *See* J.A. 117–29 (Opening Brief), 155–65 (Reply Brief). Instead, as noted, he argued that the Board "failed to consider and apply the provisions of . . . § 3.156(c)." J.A. 123; *see* J.A. 128 (raising "a question of regulatory interpretation" regarding whether "the use of the phrase 'that existed' [in § 3.156(c)(1)] mean[s] that the relevant official service department records must have existed when the VA first decided the claim"). Mr. Kisor's failure to challenge the Board's interpretation of "relevant" before the Veterans Court could constitute waiver. *See Emenaker*, 551 F.3d at 1337 ("In order to present a legal issue in a veteran's appeal, the appellant ordinarily must raise the issue properly before the Veterans Court . . . ."). The Board did determine, however, that the "service department records received . . . were not relevant." J.A. 79; *see* J.A. 91 (stating that "those docu-

regulation provides that the VA will "reconsider" a claim if it "receives or associates with the claims file *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. § 3.156(c)(1) (emphasis added). Mr. Kisor states that the VA should have reconsidered his claim under the regulation and thus afforded him the favorable effective date treatment that the regulation provides. He argues that the Veterans Court, like the Board, "mistakenly interpreted the term 'relevant' as used in 38 C.F.R. § 3.156(c)(1) as related only to service department records that countered the basis of the prior denial." Appellant's Br. 5. In making this argument, he points to § 3.156(c)(1)(i), which provides in part that service department records "include, but are not limited to: . . . [s]ervice records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of [subsection] (c) of this section are met."[9] Appellant's Br. 8–9. Stating that nothing in the regulation "says

---

ments were not relevant to the [VA's] decision" denying his 1982 claim); *see also* J.A. 147 (VA Response Brief before the Veterans Court explaining that the Board determined that the service records were not relevant). And at oral argument before us, the government abandoned its contention that Mr. Kisor had waived his argument regarding the interpretation of § 3.156(c)(1). Oral Argument at 18:47–21:30 (No.16-1929), http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2016-1929.mp3. Accordingly, we decline to find waiver here. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (stating that waiver is an issue "left primarily to the discretion of the courts of appeals").

[9] There is no dispute that the personnel records at issue in this case are "service records" within the meaning of 38 C.F.R. § 3.156(c)(1)(i).

that the service records must relate to the reason for the last denial," Mr. Kisor urges that a service department record is relevant if it has "any tendency to make the existence *of any fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence." Appellant's Br. 9–10 (quoting *Counts v. Brown*, 6 Vet. App. 473, 476 (1994)). According to Mr. Kisor, the newly-provided service department records demonstrate that he was subjected to the trauma of combat, thereby establishing his exposure to an in-service stressor. *Id.* at 12–13.

The government responds that the Veterans Court and the Board did not misinterpret § 3.156(c)(1). The government takes the position that whether a service department record is relevant depends upon the particular claim and the other evidence of record. Appellee's Br. 14. Thus, the government posits, "if a record is one that the VA had no obligation to consider because it would not have mattered in light of the other evidence, then it cannot trigger reconsideration." *Id.* at 15.

Turning to the case at hand, the government states that the records based upon which Mr. Kisor seeks reconsideration under § 3.156(c)(1) address only the issue of whether there was an in-service stressor, not the requisite medical diagnosis of PTSD. *Id.* at 17. The government states: "The issue of an in-service stressor was never disputed in the 1983 claim; in fact, the examiner noted that Mr. Kisor participated in Operation Harvest Moon and 'was involved in one major ambush which resulted in 13 deaths in a large company.'" *Id.* (citing J.A. 19–20). Accordingly, the government argues that none of the service department records at issue were rele-

vant under the regulation because they related to the existence of an in-service stressor, which was not in dispute, rather than to a diagnosis of PTSD, the absence of which was the basis for the RO's denial of Mr. Kisor's claim in 1983. *Id.* at 17–18.

Finally, the government urges us to reject Mr. Kisor's argument that the Veterans Court and the Board construed the regulation too narrowly because they interpreted relevance as "related only to records that countered the basis of the prior denial." *Id.* at 18 (citing Appellant's Br. 5). The government contends that neither tribunal required that the evidence relate to the basis for the prior denial in all cases. *Id.* at 18–19. Rather, the evidence simply has to be "relevant." The government concludes that "[i]t just so happened that in the present case, evidence related to the in-service stressor could not be relevant without a medical diagnosis for PTSD at the time of the previous claim." *Id.* at 19.

III.

For the following reasons, we hold that the Veterans Court did not misinterpret § 3.156(c)(1). We therefore affirm the court's decision affirming the Board's decision denying Mr. Kisor entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for PTSD.

At the heart of this appeal is Mr. Kisor's challenge to the VA's interpretation of the term "relevant" in 38 C.F.R. § 3.156(c)(1).[10] As a general rule,

---

[10] The Board interpreted 38 C.F.R. § 3.156(c)(1) when it ruled that Mr. Kisor's service department records were not "relevant" under that subsection. *See* J.A. 90–91. Because the Board is part of the VA, *see* 38 U.S.C. § 7101(a); *Henderson ex rel. Hen-*

we defer to an agency's interpretation of its own regulation "as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation." *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006) (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945)); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) ("[A]n agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." (internal quotation marks omitted) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997))).

We hold that § 3.156(c)(1) is ambiguous as to the meaning of the term "relevant." In our view, the regulation is vague as to the scope of the word, and canons of construction do not reveal its meaning. *See Gose*, 451 F.3d at 839 (ruling that a regulatory phrase is ambiguous when "the regulation is vague as to the scope of the phrase"); *Cathedral Candle Co. v. Int'l Trade Comm'n*, 400 F.3d 1352, 1362 (Fed. Cir. 2005) (holding a statute ambiguous when "traditional tools of statutory construction" did not resolve the construction dispute). Significantly, § 3.156(c)(1) does not specify whether "relevant" records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard. This uncertainty in application suggests that the regulation is ambiguous. *See, e.g., Abbott Labs. v. United States*, 573 F.3d 1327, 1331 (Fed.

---

derson v. Shinseki, 562 U.S. 428, 431 (2011), the Board's interpretation of the regulation is deemed to be the agency's interpretation.

Cir. 2009) (holding the regulatory term "affect" was ambiguous when the regulation did not specify the types of effects falling within its scope).

The varying, alternative definitions of the word "relevant" offered by the parties further underscore § 3.156(c)(1)'s ambiguity. *See Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions . . . , each making some sense under the statute, itself indicates that the statute is open to interpretation."); *Hymas v. United States*, 810 F.3d 1312, 1320–21 (Fed. Cir. 2016). In his briefs, Mr. Kisor defines "relevant" in a way mirroring the federal rules of evidence. *Compare* Appellant's Br. 9–10 (defining "relevant" as "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable" (emphasis omitted)), *with* Fed. R. Evid. 401(a)–(b) (defining "relevant" as "any tendency to make a fact more or less probable" when the "fact is of consequence in determining the action"). Mr. Kisor thus posits that his personnel records are "relevant" because they speak to the presence of an in service stressor, one of the requirements of compensation for an alleged service-connected injury. *See* 38 C.F.R. § 3.304(f).

The government, in contrast, collects various competing definitions from case law, legal dictionaries, and legal treatises. *See* Appellee's Br. 14–15 (defining "relevant" as, *inter alia*, "bearing upon or properly applying to the matter at hand," and "[l]ogically connected and tending to prove or disprove a matter *in issue*" (emphasis added) (citing *Forshey v. Principi*, 284 F.3d 1335, 1351 (Fed. Cir. 2002) (en banc); *Relevant*, BLACK'S LAW DICTIONARY (10th ed. 2014))). These definitions support the gov-

ernment's argument that, in this case, Mr. Kisor's personnel records were not "relevant" because they addressed the matter of an in-service stressor, which was not "in issue," rather than the issue of whether he suffered from PTSD, which was "in issue." Both parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable. We thus conclude that the term "relevant" in § 3.156(c)(1) is ambiguous. *See Viraj Grp. v. United States*, 476 F.3d 1349, 1355–56 (Fed. Cir. 2007) (ruling that a "regulation is ambiguous on its face" when competing definitions for a disputed term "seem reasonable"); *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1320–21 (Fed. Cir. 2003).

Because § 3.156(c)(1) is ambiguous, the only remaining question is whether the Board's interpretation of the regulation is "plainly erroneous or inconsistent" with the VA's regulatory framework. *Long Island*, 551 U.S. at 171. As seen, the Board reasoned that Mr. Kisor's supplemental personnel records were not relevant because they contained information that (1) was already known, acknowledged, and undisputed in the RO's 1983 decision, and (2) did not purport to affect the outcome of that decision. J.A. 90–91. The Board's ruling was thus based upon the proposition that, as used in § 3.156(c)(1), "relevant" means noncumulative and pertinent to the matter at issue in the case. The Board's interpretation does not strike us as either plainly erroneous or inconsistent with the VA's regulatory framework.

In this case, the records Mr. Kisor submitted to the RO in 2006 detailing his participation in Operation Harvest Moon were superfluous to the information already existing in his file. Indeed, in 1983

the VA examiner expressly recounted how Mr. Kisor experienced "one major ambush which resulted in 13 deaths in a large company," and that "[t]his occurred *during Operation Harvest Moon*." J.A. 19–20 (emphasis added). In addition, Mr. Kisor's personnel records submitted in 2006 are not probative here because they do not purport to remedy the defects of his 1982 PTSD claim. The RO denied Mr. Kisor's PTSD claim because the requisite diagnosis of PTSD was lacking. J.A. 21–23; *see* 38 C.F.R. § 3.304(f) (requiring a diagnosis of PTSD to establish service connection); *Young v. McDonald*, 766 F.3d 1348, 1354 (Fed. Cir. 2014) ("[T]he VA has long required a medical diagnosis of PTSD to establish service connection."). Mr. Kisor does not urge that the 2006 records provide that diagnosis. *See* Appellant's Br. 5–6. Instead, the records show that Mr. Kisor was exposed to an in-service stressor—a wholly separate element for establishing service connection that, critically, was never at issue in the case. J.A. 19–20. Because Mr. Kisor's 2006 records did not remedy the defects of his 1982 claim and contained facts that were never in question, we see no plain error in the Board's conclusion that the records were not "relevant" for purposes of § 3.156(c)(1). *See Blubaugh*, 773 F.3d at 1314 (reasoning that § 3.156(c) did not apply when service records "did not remedy [the] defects" of a prior rating decision and contained facts that "were never in question").

Finally, as noted, Mr. Kisor argues that the Board and Veterans Court construed § 3.156(c)(1) too narrowly, by interpreting "relevant" records to be "records that countered the basis of the prior denial [of benefits]." Appellant's Br. 5. We do not agree with this reading of the Board's or the Veterans Court's decision. Nothing in either tribunal's interpretation

of § 3.156(c)(1) strikes us as requiring, across the board, that relevant records *must* relate to the basis of a prior denial. Rather, we understand the Board and Veterans Court as finding only that, on the facts and record of this case, Mr. Kisor's later-submitted materials were not relevant to determination of *his* claim. *See Kisor*, 2016 WL 337517, at *2–3.

CONCLUSION

For the foregoing reasons, we see no error in the Board's interpretation of § 3.156(c)(1) or in the Veterans Court's affirmance of the Board's interpretation. *See Kisor*, 2016 WL 337517, at *2. The decision of the Veterans Court affirming the Board's decision denying Mr. Kisor entitlement to an effective date earlier than June 5, 2006 for service connection for PTSD is therefore affirmed.

AFFIRMED

COSTS

No costs.

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 14-2811

James L. Kisor, Appellant,

v.

Robert A. McDonald,
Secretary of Veterans Affairs, Appellee.

Before LANCE, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

LANCE, *Judge*: The appellant, James L. Kisor, through counsel, appeals an April 29, 2014, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for post-traumatic stress disorder (PTSD), to include on the basis of clear and unmistakable error (CUE) in a May 1983 rating decision. Record (R.) at 2-18. Single-judge disposition is appropriate. *See Frankel v.*

Derwinski, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the April 29, 2014, decision.

I. FACTS

The appellant served in the U.S. Marine Corps from November 1962 to November 1966, including service in Vietnam. R. at 177, 1053. In December 1982, the appellant filed his initial claim for VA disability compensation benefits for PTSD. R. at 1043-46. The Portland, Oregon, VA regional office (RO) issued a rating decision in May 1983 that denied the appellant's claim, finding that there was no current diagnosis for PTSD. R. at 1003-05. The appellant initiated but did not perfect an appeal of that decision, R. at 1001, and it became final.

In June 2006, the appellant submitted a request to reopen his previously denied claim for service connection for PTSD and submitted additional evidence. R. at 961-65. In September 2007, the RO issued a rating decision that reopened the appellant's previously denied claim, granted service connection for PTSD, and assigned a 50% disability rating, effective June 2006. R. at 730-33. The appellant filed a Notice of Disagreement in November 2007 challenging both the assigned disability rating and effective date and alleging CUE in the May 1983 rating decision. R. at 707-11. The RO issued a decision review officer decision in March 2009 that increased the appellant's initial schedular rating to 70% disabling and granted a 100% rating on an extraschedular basis, effective June 2006. R. at 643-48. In January 2010, the RO issued a Statement of the Case denying entitlement to an earlier effective date for the grant of service con-

nection for PTSD, including on the basis of CUE. R. at 379-91. The appellant perfected his appeal in March 2010. R. at 349-58.

On April 29, 2014, the Board issued the decision here on appeal, finding that "the effective date assigned [(June 5, 2006)] was the earliest allowable effective date due to the finality of the May 1983 rating decision." R. at 9. The Board also found that "the lack of [recently received service department] documents before the adjudicator in May 1983 was not CUE" and, therefore, denied the appellant an earlier effective date on that basis. R. at 16. This appeal followed.

II. ANALYSIS

The appellant argues that the Board failed to consider and apply the provisions of 38 C.F.R. § 3.156(c). Appellant's Brief (Br.) at 1-9; Reply Br. at 1-7. Specifically, he contends that the Board "mistakenly considered and misapplied the provisions of § 3.156(c) **only** in the context of its consideration of whether there was [CUE] in the . . . May 1983 decision." Appellant's Br. at 5. The Secretary responds that the Board appropriately considered and applied the provisions of § 3.156(c) to the evidence in question. Secretary's Br. at 13-21.

If a previously denied claim is later reopened and granted based on the submission of new and material evidence, the effective date of benefits will ordinarily be the date that the claimant filed the application to reopen or the date entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(q)(2) (2015). However, if the award is based on newly discovered service department records, the claimant may be entitled to an effective date as early as the

date of the original claim. *Mayhue v. Shinseki*, 24 Vet.App. 273, 279 (2011); 38 C.F.R. § 3.156(c) (2015).

The appellant asserts that "[i]t was a clear error for the Board to have failed to consider or apply the provisions of § 3.156(c) because the VA's receipt of relevant service records, which had not been previously considered by the VA, required the VA to reconsider [his] initial claim." Appellant's Br. at 6. The Court disagrees. Here, the Board specifically acknowledged that "[a] claim that is disallowed, even if the disallowance became final, is to be reconsidered instead of reopened if relevant service department records which existed but were not available at the time are received at any time thereafter." R. at 13 (citing 38 C.F.R. § 3.156(c)). The Board also noted that the regulation requires that "the effective date [be] the later of the date the previously decided claim was received or the date entitlement arose." *Id.*

Contrary to the appellant's assertions, the Board explicitly acknowledged that "[s]ervice department records were received following the May 1983 rating decision" which "fall under the purview of § 3.156(c)(1)(i)." R. at 14-15. The Board determined, however, that the newly received records were not relevant. R. at 15; *see Prickett v. Nicholson*, 20 Vet.App. 370, 375 (2006) (Board decision generally should be read as a whole). The Board noted that"[t]he May 1983 rating decision denied service connection because there was no diagnosis of PTSD" and, thus, that "relevant evidence, whether service department records or otherwise, received after the rating decision would suggest or better yet establish that the [appellant] has PTSD as a current disability." R. at 15.

However, the Board determined that the newly received "service personnel records and the daily log skip this antecedent to address the next service connection requirement of a traumatic event during service." R. at 15. The Board concluded that "those documents were not outcome determinative in that they do not manifestly change [the] outcome of the decision . . . [as] the basis of the [May 1983] denial that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the [appellant] engaged in combat with the enemy during service." *Id.* The appellant does not assert that the service department records contain a diagnosis of PTSD.

In its recent decision in *Young v. McDonald*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) held that, "[i]n order to determine the 'date entitlement arose' within the meaning of 38 C.F.R. § 3.156(c), it is necessary to look at [the criteria establishing service connection for PTSD]." 766 F.3d 1348, 1352 (Fed. Cir. 2014). The Federal Circuit concluded that "entitlement could not arise until the pertinent regulatory requirements were satisfied, including the existence of 'medical evidence diagnosing'" PTSD. *Id.* at 1354 (quoting 38 C.F.R. § 3.304(f)). Accordingly, the Court agrees with the Secretary that "a full reading of the instant decision clearly shows that the [Board] raised application of 38 C.F.R. § 3.156(c)," but ultimately concluded that the newly received documents were not relevant. Secretary's Br. at 13-14; *see Prickett*, 20 Vet.App. at 375.

Finally, the Court need not address the appellant's argument that "this case presents an issue of regulatory interpretation" regarding the meaning of the phrase "that existed" in § 3.156(c)(1), Appellant's

Br. at 8, as the Board's decision did not turn on that question but rather on whether the records were relevant, R. at 15. In all, the Court is not persuaded that the Board incorrectly applied § 3.156(c), and it holds that the appellant has failed to demonstrate error in the Board's findings that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD. *See Evans v. West*, 12 Vet.App. 396, 401 (1999) (holding that the Court reviews the Board's determination of the proper effective date under the "clearly erroneous" standard of review); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). The Court will, therefore, affirm the Board's decision.

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's April 29, 2014, decision is AFFIRMED.

DATED: January 27, 2016

Copies to:

Kenneth M. Carpenter, Esq.

VA General Counsel (027)

APPENDIX C

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF JAMES L. KISOR

DOCKET NO. 10-08 429A

DATE APR 29 2014

On Appeal From The
Department Of Veterans Affairs Regional Office In
Portland, Oregon

THE ISSUE

Entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for posttraumatic stress disorder (PTSD), to include on the basis of clear and unmistakable error (CUE) in a May 1983 rating decision,

REPRESENTATION

Veteran represented by: Philip E. Cushman, Agent

WITNESSES AT HEARING ON APPEAL

Veteran and Spouse

ATTORNEY FOR THE BOARD

S. Becker, Counsel

INTRODUCTION

The Veteran served on active duty from November 1962 to November 1966, to include service in the Republic of Vietnam (RVN).

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a September 2007 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Portland, Oregon, that granted service connection for PTSD effective June 5, 2006.

The Board remanded this claim for a hearing before a Veterans Law Judge in February 2012. The Veteran and spouse testified with the assistance of the representative before the undersigned in June 2012.

The representative was appointed when the appropriate form was received, with a statement that no compensation is being paid in March 2009. The representative is not accredited by VA. Therefore, this matter is the one time this representative can act in that capacity unless an exception is granted. 38 U.S.C.A. § 5903 (West Supp. 2013); 38 C.F.R. § 14.630 (2013).

FINDING OF FACT

There is no basis for an effective date earlier than June 5, 2006, and the May 1983 did not contain CUE or due process violation, and equitable tolling is not for application, and service department records received thereafter were not relevant.

CONCLUSION OF LAW

An effective date earlier than June 5, 2006, for the grant of service connection for PTSD is not warranted. 38 U.S.C.A. § 4005 (West 1982); 38 U.S.C.A. §§ 5103, 5103A, 5107, 5109A, 5110, 7105 (West 2002); 38 C.F.R. §§ 3.160, 19.115, 19.116, 19.118, 19.153 (1982); 38 C.F.R. §§ 3.156, 3.400

(2006); 38 C.F.R. §§ 3.1, 3.102, 3.105, 3.155, 3.156, 3.157, 3.159, 3.160, 3.400, 19.29, 20.202, 20.302, 20.1103 (2013).

REASONS AND BASES FOR FINDING AND CONCLUSION

Duties to Notify and Assist

VA has a duty to notify and a duty to assist the claimant in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5103, 5103A (West 2002);38 C.F.R. § 3.159 (2013). However, those duties are not applicable when the law and not the evidence is dispositive. *Smith v. Gober*, 14 Vet. App. 227 (2000), *aff'd*, 281 F.3d 1384 (Fed. Cir. 2002); *Mason v. Principi*, 16 Vet. App. 129 (2002); *Manning v. Principi*, 16 Vet. App. 534 (2002); *Livesay v. Principi*, 15 Vet App 165 (2001); *Dela Cruz v. Principi*, 15 Vet. App. 143 (2001); *Sabonis v. Brown*, 6 Vet. App. 426 (1994); VAOPGCPREC 5-2004 (2004), 69 Fed. Reg. 59,989 (2004). That is the case in this matter, and is often is the case regarding an earlier effective date claim. *Nelson v. Principi*, 18 Vet. App. 407 (2004). It always is the case regarding CUE. *Parker v. Principi*, 15 Vet. App. 407 (2002).

Even if the duties to notify and assist were applicable, the Board finds that they have been satisfied. A letter dated in September 2006 notified the Veteran and his representative regarding the claim. The letter included information on how an effective date is assigned if service connection is granted. The letter reiterated that service connection was granted in the September 2007 rating decision. In other words, any notice defect was not prejudicial and no further notice was required because the claim was substantiated. *Hartman v. Nicholson*, 483 F.3d 1311 (Fed.

Cir. 2007); *Dunlap v. Nicholson*, 21 Vet. App. 112 (2007). No assistance, whether in the form of procuring records, providing a medical examination or opinion, or otherwise, has been identified by the Veteran or representative as necessary.

Earlier Effective Date

The effective date of an award of benefits shall be the day following discharge if application therefor is received within one year from that date. 38 U.S.C.A. § 5110(b)(1) (West 2002). Otherwise, the effective date of an award shall be fixed in accordance with the facts found but shall not be earlier than the date of receipt of the claim for compensation. 38 U.S.C.A. § 5110(a) (West 2002). Regulations governing the effective date of an award for a claim reopened after final disallowance based on the receipt of new and material evidence generally specify that it is the date of receipt of the claim to reopen or the date entitlement arose, whichever is later. 38 C.F.R. §§ 3.400(q)-(r) (2013).

Neither the Veteran nor his representative has alleged that he filed a service connection claim for PTSD between his discharge from service in November 1966 and November 1967. Accordingly, the earliest effective date possible is the date of receipt of a claim for service connection for PTSD. A claim is a written formal or informal communication requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit. 38 C.F.R. § 3.1(p) (2013). An informal claim is a communication or action indicating intent to apply for a benefit. 38 C.F.R. § 3.155(a) (2013). In certain circumstances, VA or private medical evidence may be accepted as an informal claim. 38 C.F.R. § 3.157 (2013).

Neither the Veteran nor representative has alleged that a formal or informal claim was filed prior to December 3, 1982. There are no communications requesting or asserting a belief in entitlement to service connection for PTSD before that date. There also are no communications indicating, or suggesting, an intent to apply for service connection for PTSD before that date. There are no communications of record from the Veteran or otherwise referencing PTSD prior to it. No medical evidence, whether VA or private, is of record before that date. The first pertinent document is the Veteran's formal service connection claim for PTSD received on December 3, 1982.

That claim was denied in a May 9, 1983, rating decision because he did not have a diagnosis of PTSD. It was noted that, in addition to service medical records, a February 1983 letter from the Portland Vet Center was considered. The service medical records did not contain a diagnosis or manifestations of any mental illness. The letter discussed the Veteran's symptoms, for which he had received treatment, and indicated that they were associated with a diagnosis of PTSD. However, a March 1983 VA medical examination diagnosed intermittent explosive disorder and atypical personal disorder. The examination report reveals that those diagnoses were made in favor of a diagnosis of PTSD, which specifically was rejected.

A disallowance is final when a notice of disagreement is not filed by the claimant within the one year period from the date of notice of it. 38 U.S.C.A. §§ 4005(b)(1), (c) (West 1982) (today 38 U.S.C.A. §§ 7105(b)(1), (c) (West 2002); 38 C.F.R. §§ 3.160(d), 19.118(a)(1) (1982) (today 38 C.F.R. § 3.160(d),

20.302(a) (2013)). If a notice of disagreement is timely filed, a statement of the case is issued. 38 U.S.C.A. § 4005(d)(1) (West 1982) (today 38 U.S.C.A. § 7105(d)(1) (West 2002)); 38 C.F.R. §§ 19.115(b), (c) (1982) (today 38 C.F.R. § 19.29 (2013)). The claimant then has 60 days from the date the statement of case is mailed or the remainder of the one year period after notification of the decision, whichever is later, to file a formal or substantive appeal. 38 U.S.C.A. § 4005(d)(3) (West 1982) (today 38 U.S.C.A. § 7105(d)(3) (West 2002)); 38 C.F.R. § 19.118(b)(1) (1982) (today 38 C.F.R. § 20.302(b)(1) (2013)). The failure to timely file an appeal results in the disallowance becoming final. 38 C.F.R. § 19.153 (1982) (today 38 C.F.R. § 20.1103 (2013)).

Immediately following the May 1983 rating decision, the Veteran was notified of it on May 13, 1983. He timely filed a notice of disagreement in June 1983. A June 13, 1983, statement of the case was issued on June 14, 1983. The Veteran had from then until May 13, 1984, the remainder of the one year period from the date of notice of the rating decision, to file a formal or substantive appeal. However, it appears that he believed he only had 60 days to file such an appeal. A request for an extension, based on pending evidence, indeed was received on August 10, 1983. That request was granted by a letter dated August 19, 1983. A reasonable extension is permissible for good cause. 38 U.S.C.A. § 4005(d)(3) (West 1982) (today 38 U.S.C.A. § 7105(d)(3) (West 2002)). The Veteran was allowed an additional 60 days from that date to file a formal or substantive appeal.

In September 1983, the Veteran submitted a letter requesting another VA medical examination. He claimed that the examination report noted that a

portion of the original dictation of the examination was lost and that the examiner misunderstood some of what he related. A September 1983 letter from the Veteran's representative also requested another VA medical examination on the grounds that the March 1983 examination was inadequate. A letter dated October 17, 1983, informed him and his representative that the examination was sufficient for diagnostic purposes. It was noted that no change in the previous determination was warranted and that service connection for PTSD remained denied.

A formal or substantive appeal consists of the appropriate form or correspondence containing information necessary to appeal such as identification of the issues being appealed, if the claim is comprised of more than one, and specific arguments relating to errors of law or fact made in disallowing the benefits sought. 38 U.S.C.A. § 4005(d)(3) (West 1982) (today 38 U.S.C.A. § 7105(d)(3) (West 2002)); 38 C.F.R. §§ 19.115(c)(2), 19.116 (1982) (today 38 C.F.R. § 20.202 (2013)). No timely substantive appeal form was received from the Veteran or his representative within the applicable appeal period. Neither has alleged that one or both of the September 1983 letters constituted a formal or substantive appeal. Both lacked necessary information for an appeal. They do not indicate that service connection for PTSD, the sole issue of his claim, was being appealed. It follows that neither is a formal or substantive appeal even if the contents could be interpreted as an identification of specific errors of law or fact. Without such an appeal, the May 1983 rating decision disallowing service connection became final.

Neither the Veteran nor his representative has alleged that, other than the aforementioned claim, a

formal or informal claim was filed prior to June 5, 2006. There are no communications subsequent to the September 1983 letters, but before that date requesting or asserting a belief in entitlement to service connection for PTSD. There are also no communications indicating, or even suggesting, an intent to apply for service connection for PTSD subsequent to the letters but before that date. there are no communications from the Veteran or otherwise referencing PTSD during that time. No additional medical evidence, whether VA or private, exists before that time. Thus, the next pertinent document is the Veteran's claim to reopen service connection for PTSD received on June 5, 2006. That claim is informal because, rather than the appropriate form, it is a letter. Yet it clearly conveys his desire to apply for service connection for PTSD.

The Board finds that the date of receipt of the Veteran's claim to reopen on June 5, 2006, is the earliest effective date allowable for the grant of service connection based on new and material evidence. The RO first reopened the claim in a September 2007 rating decision. Service connection was granted, effective June 5, 2006. The Board finds that the effective date assigned was the earliest allowable effective date due to the finality of the May 1983 rating decision. The only way to obtain an even earlier effective date accordingly is to successfully challenge the validity of the May 1983 decision. However, there is a strong presumption of validity. The burden on the Veteran and his representative is substantial. *Grover v. West*, 12 Vet. App. 109 (1999); *Daniels v. Gober*, 10 Vet. App. 474 (1997); *Caffrey v. Brown*, 6 Vet. App. 377 (1994).

Several arguments have been made by the Veteran and representative to attempt to vitiate the finality of the May 1983 rating decision. First, they assert that a page of service personnel records noting the Veteran's participation in Operation Harvest Moon in the Vietnam was obtained, but destroyed, prior to the May 1983 decision. They alternatively contend that page should have been, but was not, prior to the May 1983 decision. The Veteran and his representative reiterate the previously expressed belief that reliance in May 1983 decision on a March 1983 VA examination was inappropriate and that another VA medical examination should have been provided. They also allege that treatment records from the Portland Vet Center should have been, but were not, obtained prior to the May 1983 decision. Finally, the Veteran's contends that his mental state prevented him from acting to ensure the benefit sought was granted prior to June 5, 2006.

The arguments that a page of service personnel records was obtained, but destroyed, prior to the May 1983 decision does not appear to be correct. The only proof offered by the Veteran and his representative is the reference in the June 1983 statement of the case that service medical records were received from the National Personnel Records Center on April 11, 1983. However, service medical records are not the same as service personnel records. The Veteran's service medical records were obtained by VA prior to the May 1983 rating decision as stated in the statement of the case and they were considered in the May 1983 rating decision. The page of the Veteran's service personnel records noting his participation in Operation Harvest Moon in the Vietnam was first submitted by him in June 2006. Service personnel records, to include that page, were not requested by

VA until November 2006. They were received at some unspecified point thereafter. Therefore, the page in question was not obtained, but then destroyed, prior to the May 1983 rating decision.

Regarding the argument that the service personnel records and Vet Center records should have been obtained prior to the May 1983 decision, which equates to an allegation of a duty to assist failures, the Veteran and his representative have characterized that argument as a claim of violations of the Due Process Clause of the Fifth Amendment of the United States Constitution. It states that "no person shall ... be deprived of life, liberty, or property, without due process of law." US Const. Amend. V. A property interest, in that compensation often is paid to one entitled to a VA disability benefit, is at issue. Even Veterans claiming such a benefit, as opposed to just Veterans who have established entitlement to it, have a due process right to fair adjudication. *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009) (reliance on an altered VA treatment record in denying a total disability rating based on individual unemployability violated due process). However, that case does not stand for the proposition that any theory that VA failed in its duty to assist constitutes a violation of due process. *Schimek v. Shinseki*, 2012 WL 263098 (Vet. App. Jan. 31, 2012): *Schimek*, as it was not reported, is not a decision of precedent. However, nonprecedential decisions may be relied upon for any persuasive reasoning they contain. *Bethea v. Derwinski*, 2 Vet. App. 252 (1992). Some duty to assist failures, are so egregious that they are due process violations. Evidence was altered to the detriment of the Veteran's representative, and no explanation could be provided. That first was discovered years after adjudication. No remedy other than

due process could serve as a cure for the tainted adjudication. Other duty to assist failures are not as significant. An example is not considering available evidence. *King v. Shinseki*, 26 Vet. App. 433 (2014). That could be discovered at the time of the adjudication, and a CUE motion could serve as a remedy for the tainted adjudication even if discovery was later. *King v. Shinseki*, 26 Vet. App. 433 (2014).

Even assuming that the duty to assist arguments regarding the claim of CUE are correct, they are not due process violations. The Veteran knew about the assumed VA medical examination deficiency shortly following the May 1983 rating decision given his September 1983 letter. He also either knew or should have known about the assumed deficiency in not obtaining his Portland Vet Center treatment records. Indeed, it appears that he submitted the February 1983 letter from the Vet Center. It mentions treatment, which implies records, that he was undergoing. Yet be did not either submit the treatment records or request they be obtained by VA. Even if he did not submit that letter, he was aware that he was undergoing treatment. The only possible explanation for no treatment records being referenced in the rating decision and the June 1983 statement of the case is that they had not been obtained. The Veteran either knew or should have known about the assumed deficiency in not obtaining the page of his service personnel records noting his participation in Operation Harvest Moon in the RVN for that same reason.

The remedy available to the Veteran was to appeal. He initiated an appeal but did not perfect it, notwithstanding his knowledge or at least his ability to know of the aforementioned assumed duty to assist failures. He had an opportunity to claim the as-

sumed failures to try to rectify them. Due process requires nothing more. *Prinkey v. Shinseki*, 735 F.3d 1375 (Fed.Cir.2013); *Guillory v. Shinseki*, 603 F.3d 981 (Fed.Cir.2010). Yet the Veteran ultimately chose not to perfect an appeal. That he did not avail himself of an appeal when he could have is not sufficient reason to deem the May 1983 rating decision invalid. Additional support for this is derived from the fact that the assumed duty to assist failures were not particularly egregious. No evidence was altered to the Veteran's detriment. No evidence was altered. Evidence instead was not obtained when it assumedly should have been, and assumedly impermissible reliance was placed on less than complete evidence in the case of the VA medical examination.

To the extent the arguments continue to be characterized by the Veteran and his representative as CUE in the May 1983 rating decision, they must fail. The statutory provision and regulatory provision regarding CUE are not enlightening as to its nature. 38 U.S.C.A. § 5109A (West 2002); 38 C.F.R. § 3.105(a) (2013). Yet well-established case law is enlightening. CUE is a very specific and rare kind of error. *Fugo v. Brown*, 6 Vet. App. 40 (1993). A determination that there was CUE must be based on the law and evidence at the time of the challenged adjudication. *Damrel v. Brown*, 6 Vet App. 242 (1994). The error must have been outcome determinative in that the result would have been different but for it. *Fugo v. Brown*, 6 Vet. App. 40 (1993); *Russell v. Principi*, 3 Vet. App. 310 (1992).

It is well-established that duty to assist failures do not constitute CUE. *Baldwin v. West*, 13 Vet. App. 1 (1999); *Shockley v. West*, 11 Vet. App. 208 (1998); *Crippen v. Brown*, 9 Vet. App. 412 (1996). Therefore,

the assumed failures of not providing the Veteran with another VA medical examination, not obtaining a page of service personnel records noting his participation in Operation Harvest Moon, and not obtaining his treatment records from the Portland Vet Center are not CUE. It is reiterated that CUE can only be based on the examination and records available at the time of the May 1983 rating decision, not on that which should have been but was not available then. The reliance placed in the rating decision on the March 1983 VA examination also does not constitute CUE. Even assuming this reliance was inappropriate, it was not outcome determinative. Service connection still would have been denied absent it because the rater weighed the evidence and determined that there was no diagnosis of PTSD. Even had Vet Center records been of record and showed additional information regarding a diagnosis of PTSD, the rating specialist could still have relied upon the March 1983 VA examination. A challenge to the weigh in which evidence was weighed by the adjudicator cannot constitute CUE. Even if the Vet Center records had been reviewed and the page of service personnel records, reasonable minds can differ as to whether service connection for PTSD would have been allowed. Therefore, there is not CUE.

The argument that the Veteran was of insufficient mental capacity to pursue his claim is essentially an argument for equitable tolling. Equitable tolling applies where the Veteran's failure to act was the direct result of a mental illness that rendered him incapable of rational thought or deliberate decision making, handling his affairs, or functioning in society. *Barrett* v. *Principi*, 363 F.3d 1316 (Fed. Cir. 2004). There is a rebuttable presumption that all federal statutes of limitations contain an implied eq-

uitable tolling provision. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990). However, 38 U.S.C.A. § 5110 (West 2002) is not a federal statute of limitations. *Butler v. Shinseki*, 603 F.3d 922 (Fed. Cir. 2010); *Andrews v. Principi*, 351 F.3d 1134 (Fed. Cir. 2003). It is a federal statute setting forth when awards begin. Therefore, equitable tolling is not for consideration.

Equitable tolling, even assuming it was for consideration, would not be warranted. No proof has been offered that the Veteran's failure to act to ensure service connection was granted effective prior to June 5, 2006, was due to mental illness rendering him incapable of rational thought, deliberate decision making, handling his affairs, or functioning in society. Despite problems, all indications are to the contrary. It was determined at the March 1983 VA medical examination that the Veteran's functioning was fair and that he was capable of handling funds. A February 1983 VA social summary concluded that he expressed himself well. The Veteran successfully filed his claim, initiated an appeal, and requested an extension for perfecting an appeal. Thus, he was rational and deliberate in decision making. An August 2007 private medical examination and a September 2007 VA medical examination, both of which covered his history to some extent, show nothing suggestive of irrationality or an inability to make decisions deliberately, handle affairs, or function in society subsequently.

Although not argued by the Veteran or his representative, another way to challenge the May 1983 rating decision must be considered. That challenge does not concern the validity of the decision but, like equitable tolling, concerns finality. A claim that is

disallowed, even if the disallowance became final, is to be reconsidered instead of reopened if relevant service department records which existed but were not available at that time are received at any time thereafter. 38 C.F.R. § 3.156(c)(l) (2013). That regulation was amended on October 6, 2006. However, both prior to and after that amendment, the effective date was the later of the date the previously decided claim was received or the date entitlement arose. 38 C.F.R. § 3.400(q)(2) (2006); 38 C.F.R. § 3.156(c)(3) (2013); *Mayhue v. Shinseki*, 24 Vet. App. 273 (2011); *Vigil v. Peake*, 22 Vet. App. 63 (2008).

The version of 38 C.F.R. § 3.156(c) in effect prior to October 6, 2006, and the amended version in effect as of October 6, 2006, are very similar. With one exception, the changes made indeed were for clarification purposes and thus were not substantive in nature. *Mayhue v. Shinseki*, 24 Vet. App. 273 (2011). That exception, the exclusion of service department records that could not have been obtained when the claim was disallowed because they did not exist or the Veteran failed to provide sufficient information regarding them in 38 C.F.R. § 3.156(c)(2) (2013), does not have retroactive effect. *Cline v. Shinseki*, 26 Vet. App. 18 (2012). Yet it is clear from the ensuing discussion that the exception is not applicable here. As the only substantive change is of no consequence, only the amended version of 38 C.F.R. § 3.156(c) currently in effect will be referenced therein for the sake of simplicity.

Service department records were received following the May 1983 rating decision. The Veteran's service personnel records, which encompasses the page noting his participation in Operation Harvest Moon in the Vietnam, were submitted and obtained. The

daily log of his battalion in Vietnam for a date in December 1965 also was received in June 2007. Examples of service department records qualifying as relevant and in existence but unavailable at the time of the previous disallowance include service records concerning a claimed in-service injury, disease, or event regardless of whether they mention the Veteran by name. 38 C.F.R. § 3.156(c)(l)(i) (2013). They also include service records forwarded by the service department at any time after VA's initial request. 38 C.F.R. § 3.156(c)(1)(ii) (2013). Lastly, they include declassified records that could not have been obtained when the claim was decided because they were still classified at the time. 38 C.F.R. § 3.156(c)(1)(iii) (2013).

With respect to the daily log, the word declassified appears at the bottom. There is no indication of whether it ever was classified. Assuming it was at some point classified, there is no indication of when it was declassified. It therefore cannot be concluded, at least not without more, that the daily log could not have been obtained at the time of the May 1983 rating decision because it was classified. The Veteran's service personnel records never were classified. It is reiterated that both the daily log and those records were not requested until well after the May 1983 rating decision. The Veteran never alleged that PTSD was attributable to sustaining an injury or disease during service. He instead alleged that he suffered an in-service event which led to PTSD. His service personnel records concern him in particular but do not concern PTSD. The daily log, in addition to not concerning PTSD, does not concern him in particular.

The Veteran's service personnel records do not concern any specific traumatic event potentially causing PTSD. However, he contends the page noting his participation in Operation Harvest Moon concerns combat service which inherently is traumatic and has the potential to cause PTSD. The daily log is similar in that it recounts his battalion coming under enemy fire. Both it and the service personnel records accordingly fall under the purview of 38 C.F.R. § 3.156(c)(1)(i) (2013). Yet the "other [applicable] requirements" must be met. 38 C.F.R. § 3.156(c)(1)(i) (2013). One such requirement is that the service department records must have existed but been unavailable at the time of the previous disallowance. Once again, whether or not this was true regarding the daily log is unknown. Another requirement is that the service department records be relevant.

Unfortunately, the Veteran's service personnel records and the daily log are not relevant. The May 1983 rating decision denied service connection because there was no diagnosis of PTSD. A current disability was not found. Service connection can be granted only if there is a current disability. *Brammer v. Derwinski*, 3 Vet. App. 223 (1992). Thus, the rating decision did not address whether or not the Veteran suffered a traumatic event during service. It follows that relevant evidence, whether service department records or otherwise, received after the rating decision would suggest or better yet establish that the Veteran has PTSD as a current disability. His service personnel records and the daily log skip this antecedent to address the next service connection requirement of a traumatic event during service.

The Board also finds that those documents were not outcome determinative in that they do not mani-

festly change to outcome of the decision. Even had combat been shown in service, there finding that a diagnosis of PTSD was not warranted would not have been incorrect, such that reasonable minds cannot differ. Thus, the lack of those documents before the adjudicator in May 1983 was not CUE. Furthermore, those documents were not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat with the enemy during service.

Accordingly, the Board finds that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD. The benefit sought by the Veteran is denied. In reaching that determination, not all of the evidence has been discussed. Yet discussion of only the most salient evidence is permissible provided that all the evidence is reviewed. *Gonzales v. West*, 218 F.3d 1378 (Fed. Cir. 2000). That has been done here. The Board finds that the preponderance of the evidence is against the claim for earlier effective date. Also, no CUE is shown in a May 1983 rating decision. Therefore, the claim is denied. 38 U.S.C.A. § 5107 (West 2002); 38 C.F.R. § 3.102 (2013); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

ORDER

Entitlement to an effective date earlier than June 5, 2006, for the grant of service connection for PTSD, to include on the basis of CUE in a May 1983 rating decision, is denied.

/s/ Harvey P. Roberts
HARVEY P. ROBERTS
Veterans Law Judge, Board of Veterans' Appeals

APPENDIX D

United States Court of Appeals
for the Federal Circuit

JAMES L. KISOR,
Claimant-Appellant

v.

DAVID J. SHULKIN,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Judge Alan G. Lance, Sr.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, filed a combined petition for panel rehearing and rehearing en banc for claimant-appellant.

IGOR HELMAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, filed a response to the petition for

respondent-appellee. Also represented by CHAD A. READLER, ROBERT E. KIRSCHMAN, JR., MARTIN F. HOCKEY, JR.; Y. KEN LEE, SAMANTHA ANN SYVERSON, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before PROST, *Chief Judge*, NEWMAN, LOURIE, SCHALL*, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

O'MALLEY, *Circuit Judge*, with whom NEWMAN and MOORE, *Circuit Judges*, join, dissent from the denial of the petition for rehearing en banc.

PER CURIAM.

ORDER

Appellant filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by the appellee.

The petition for rehearing was referred to the panel that heard the appeal, and thereafter, the petition and response were referred to the circuit judges who are in regular active service. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

---

* Circuit Judge Schall participated only in the decision on the petition for panel rehearing.

The mandate of the court will be issued on February 7, 2018.

FOR THE COURT

January 31, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

United States Court of Appeals
for the Federal Circuit

JAMES L. KISOR,
Claimant-Appellant

v.

DAVID J. SHULKIN, SECRETARY
OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Judge Alan G. Lance, Sr.

O'MALLEY, *Circuit Judge*, with whom NEWMAN and MOORE, *Circuit Judges*, join, dissenting from the denial of rehearing en banc.

The panel in this case held that the word "relevant" in 38 C.F.R. § 3.156(c)(1), a regulation promulgated by the Department of Veterans Affairs ("VA"), is ambiguous. *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017). Indeed, after granting that both parties had offered reasonable interpretations of the regulation, the panel held that the regulation is not just ambiguous on its face, but that the apparent ambiguity is insoluble by resort to standard interpretive principles. *Id.* at 1367–68. The panel, thus, turned to *Bowles v. Seminole Rock & Sand Co.*, 325

U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), (collectively "*Auer*") to resolve the question presented. It concluded that the VA was entitled to deference for its interpretation of its own ambiguous regulation and, on that ground, unsurprisingly found in favor of the VA. 869 F.3d at 1368–69.

The panel predicated its decision on *Auer* deference, despite the Supreme Court's repeated reminder that statutes concerning veterans are to be construed liberally in favor of the veteran. *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011); *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994) (citation omitted). Whatever the logic behind continued adherence to the doctrine espoused in *Auer*—and I see little—there is no logic to its application to regulations promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated. When these two doctrines pull in different directions, it is *Auer* deference that must give way. I dissent from the court's refusal to take the opportunity to finally so hold.

Several justices of the Supreme Court recently have urged their colleagues to "abandon[] *Auer* and apply[] the [Administrative Procedure] Act as written." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212–13 (2015); *see, e.g.*, *id.* at 1213–25 (Thomas, J., dissenting) (identifying several "serious constitutional questions lurking beneath" the doctrine of *Auer* deference); *id.* at 1210–11 (Alito, J., concurring in part and concurring in the judgment) (noting that Justices Scalia and Thomas have offered "substantial reasons why the *Seminole Rock* doctrine may be incorrect"); *see also Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring) (recognizing that "[q]uestions of *Seminole Rock* and *Auer*

deference arise as a matter of course on a regular basis" and noting "some interest in reconsidering those cases"). *Auer* "encourag[es] agencies to write ambiguous regulations and interpret them later," which "defeats the purpose of delegation," "undermines the rule of law," and ultimately allows agencies to circumvent the notice-and-comment rulemaking process. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 551–52 (2003); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (acknowledging the "risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking" (internal quotation marks omitted)). And, on a structural level, by eliminating the separation between the entity that creates the law and the one that interprets it, *Auer* deference "leaves in place no independent interpretive check on lawmaking by an administrative agency." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 639 (1996); *see also Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part) ("*Auer* deference . . . contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 280 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (critiquing the doctrine of *Auer* deference for its effect on the separation of powers).

This court has no authority to reconsider *Auer*, of course. But, leaving aside the continued vitality of *Auer* as a general proposition, granting *Auer* deference to the VA's interpretation of its own ambiguous

regulations flies in the face of another line of Supreme Court precedent—the longstanding "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 441 (internal quotation marks omitted); *see Gardner*, 513 U.S. at 117–18 (citation omitted) (acknowledging the "rule that interpretive doubt is to be resolved in the veteran's favor"); *see also* Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling* Brown v. Gardner*'s Presumption that Interpretive Doubt Be Resolved in Veterans' Favor with* Chevron, 61 AM. U. L. REV. 59, 77 n.141 (2011) (noting that "Gardner's Presumption . . . conflicts with *Auer* deference"). In a case like this one, where the agency's interpretation of an ambiguous regulation and a more veteran-friendly interpretation are in conflict, it is unclear from our precedent which interpretation should control. *See* James D. Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. MASS. L. REV. 388, 398–401 (2014) (discussing this court's avoidance of "the tension between the canons of veteran friendliness and agency deference").[1] I have long expressed skepticism about the applicability of *Auer* in this context. *See, e.g.*, *Johnson v. McDonald*, 762 F.3d 1362, 1366–68 (Fed. Cir. 2014) (O'Malley, J., concurring) (noting "that the validity of *Auer* defer-

[1] As the response to the petition for rehearing notes, we have "rejected the argument that the pro-veteran canon of construction overrides the deference due to the [VA's] reasonable interpretation of an ambiguous statute." *Guerra v. Shinseki*, 642 F.3d 1046, 1051 (Fed. Cir. 2011) (emphasis added) (citing *Sears v. Principi*, 349 F.3d 1326, 1331–32 (Fed. Cir. 2003)). Whatever the merits of that conclusion, we have yet to decide how to resolve a conflict between the pro-veteran canon and the VA's interpretation of its own ambiguous *regulations*.

ence is questionable, both generally and specifically as it relates to veterans' benefit cases"); *Hudgens v. McDonald*, 823 F.3d 630, 639 n.5 (Fed. Cir. 2016) (O'Malley, J.) ("In many cases, the tension between *Auer* and *Gardner* is difficult to resolve, since both seemingly direct courts to resolve ambiguities in a VA regulation but would, in many cases, counsel contrary outcomes."). But, we keep finding reasons not to address the tension between these doctrines.

If only one of these doctrines can prevail in a given case, the pro-veteran canon must overcome *Auer*. "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). In interpreting a regulation—including when deciding whether the regulation is ambiguous—we apply the ordinary "rules of statutory construction." *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (citation omitted); *see also United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004) ("[W]e look to agency interpretations only when the statute or regulation remains ambiguous after we have employed the traditional tools of construction."). The "rule that interpretive doubt is to be resolved in the veteran's favor," *Gardner*, 513 U.S. at 117–18, is one of those rules of statutory construction. A regulation cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible.

As the Supreme Court has acknowledged, moreover, the "general rule" of *Auer* deference "does not apply in all cases," such as those where there are "strong reasons for withholding the deference that *Auer* generally requires." *Christopher*, 567 U.S. at 155. The "rule that interpretive doubt is to be resolved in the veteran's favor," *Gardner*, 513 U.S. at

117–18, provides just such a reason. Deferring to the VA's interpretation of a statute makes some sense because Congress has delegated to the VA the authority to "issue[] a reasonable gap-filling or ambiguity-resolving regulation." *Sears*, 349 F.3d at 1332. But, where the VA itself has "promulgate[d] [a] vague and open-ended regulation[] that [it] can later interpret as [it] see[s] fit"—to the detriment of veterans—no such deference can be warranted. *Christopher*, 567 U.S. at 158–59.

The D.C. Circuit has reached an analogous conclusion in the context of Indian law, where "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). The *Cobell* court acknowledged that, under *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), "ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration." *Cobell*, 240 F.3d at 1101. The court nevertheless found that "*Chevron* deference is not applicable" in the Indian law context. *Id.* It gave the agency's interpretation "'careful consideration,' but the normally-applicable deference was trumped by the requirement" to construe statutes liberally in favor of Indians. *Cobell v. Kempthorne* (*Cobell II*), 455 F.3d 301, 304 (D.C. Cir. 2006) (quoting *Cobell*, 240 F.3d at 1101). The D.C. Circuit has attributed its departure from the norm of *Chevron* deference to "the special strength of this canon." *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) (citing *Muscogee* (*Creek*) *Nation v. Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988)).

The veteran-friendly canon of construction, which originates in the Supreme Court's World War II–era expression of solicitude towards those who "drop their own affairs to take up the burdens of the nation," *Boone v. Lightner*, 319 U.S. 561, 575 (1943), carries comparable weight. Indeed, it is difficult to overstate the importance of the veteran-friendly approach to veterans' benefits statutes and their accompanying regulations. As we have recognized, "the veterans benefit system is designed to award 'entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.'" *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2014) (quoting *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michel, J., concurring in the result)). That overarching motivation explains "the uniquely pro-claimant nature of the veterans compensation system," *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000), as well as why the Supreme Court has "long applied" the pro-veteran canon of interpretation to the statutory scheme. *Henderson*, 562 U.S. at 441. Granting *Auer* deference to VA regulations conflicts directly with the moral principles underlying the veterans benefit system.

The VA nevertheless urges us to deny *en banc* review because the petitioner did not raise this argument in his appeal. Resp. to Pet. for Rehearing at 11 (citing *Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998)). The central focus of the parties' arguments was the interpretation of § 3.156(c)(1). It is hard to imagine how a party can waive the question of the correct legal standard to apply in deciding that question. *Cf. Winfield v. Dorethy*, 871 F.3d 555, 560 (7th Cir. 2017) ("[W]aiver does not apply to argu-

ments regarding the applicable standard of review."). I also note that, in determining whether the regulation is ambiguous, the panel expressly held that "canons of construction do not reveal its meaning." *Kisor*, 869 F.3d at 1367. The veteran-friendly canon should have fallen within that category.

Because the petition raises a significant question about our standard of review, waiver does not preclude us from addressing the question *en banc*. I note, moreover, that the absence of counsel at the early stages of veterans' appeals and the fact that, even where counsel appear, they often do so pro bono, will help assure that we will continue to find process-related excuses to avoid resolving this important question. And, as a result, veterans will continue to be prejudiced by resort to *Auer*. This case presents an ideal vehicle for us to consider the reach of *Auer* deference when it comes into conflict with the pro-veteran canon of construction. I respectfully dissent from the court's decision not to take this issue up now.

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR, PETITIONER

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
DANIEL AGUILAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

A claimant for veterans' benefits may "reopen" a claim finally adjudicated by the Department of Veterans Affairs (VA) by presenting "new and material evidence." 38 C.F.R. 3.156(a). If the VA renders a decision favorable to the veteran, the effective date of its grant of benefits generally is the later of the date the VA received the motion to reopen or the date entitlement arose. 38 C.F.R. 3.400(q)(2). The VA will "reconsider" an earlier decision if it receives "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. 3.156(c). If the VA enters an award "based all or in part on [such] records," the effective date of the new decision is generally the later of the date entitlement arose or the date the VA received the previously decided claim. 38 C.F.R. 3.156(c)(3).

In 1983, the VA denied petitioner's 1982 claim for benefits, finding that he had not shown a diagnosis of his claimed disability. In 2006, petitioner moved to reopen that decision with new and material evidence and was awarded benefits prospectively. The Board of Veterans' Appeals declined to "reconsider" the claim and award benefits retroactive to 1982, however, concluding that the service records petitioner submitted were not "relevant" under Section 3.156(c) because they did not address petitioner's lack of diagnosis of disability in 1983. The questions presented are as follows:

1. Whether the records that petitioner submitted were "relevant" under 38 C.F.R. 3.156(c)(1) so that petitioner's benefits award should have been given a 1982 effective date.

2. Whether the Court should overrule *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997).

3. Whether a substantive canon of construction displaces judicial deference under *Seminole Rock* and *Auer*.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 26

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 10
AZ v. *Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013) 15
Blubaugh v. *McDonald*, 773 F.3d 1310 (Fed. Cir. 2014) 12, 16, 19
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 10
Brown v. *Columbia Gas Transmission, LLC*, 135 S. Ct. 2051 (2015) 19
Brown v. *Gardner*, 513 U.S. 115 (1994) 20
Dahda v. *United States*, 138 S. Ct. 1491 (2018) 22
Decker v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597 (2013) 20
Encino Motorcars, LLC v. *Navarro*, 138 S. Ct. 1134 (2018) 25
Evans v. *West*, 12 Vet. App. 396 (1999) 7
Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946) 25
Flytenow, Inc. v. *FAA*, 137 S. Ct. 618 (2017) 19
Garco Constr., Inc. v. *Speer*, 138 S. Ct. 1052 (2018) 10, 19, 20, 23
Gloucester Cnty. Sch. Bd. v. *G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) 19
Glover v. *United States*, 531 U.S. 198 (2001) 24

Cases—Continued: Page

Golz v. *Shinseki*, 590 F.3d 1317 (Fed. Cir. 2010) 15
Henderson ex rel. Henderson v. *Shinseki*,
562 U.S. 428 (2011) 2, 3
Hilkert v. *West*, 12 Vet. App. 145 (1999) 7
Hyosung D & P Co. v. *United States*,
137 S. Ct. 1325 (2017) 19
Long Island Care at Home, Ltd. v. *Coke*,
551 U.S. 158 (2007) 9
Lyng v. *Northwest Indian Cemetery Protective*
Ass'n, 485 U.S. 439 (1988) 22
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 23
Noble Energy, Inc. v. *Haugrud*,
137 S. Ct. 1327 (2017) 19
Perez v. *Mortgage Bankers Ass'n*,
135 S. Ct. 1199 (2015) 10, 20, 23
Sears v. *Principi*,
349 F.3d 1326 (Fed. Cir. 2003),
cert denied, 541 U.S. 960 (2004) 19
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 23
Shedden v. *Principi*, 381 F.3d 1163 (Fed. Cir. 2004) 2
Stewart & Orchards v. *Jewell*, 135 S. Ct. 948 (2015) 19
Swecker v. *Midland Power Coop.*,
136 S. Ct. 990 (2016) 19
Talk Am., Inc. v. *Michigan Bell Tel. Co.*,
564 U.S. 50 (2011) 20, 23
United Sav. Ass'n of Texas v. *Timbers of Inwood*
Forest Assocs., Ltd., 484 U.S. 365 (1988) 21
United States v. *United Foods, Inc.*,
533 U.S. 405 (2001) 24
United Student Aid Funds, Inc. v. *Bible*,
136 S. Ct. 1607 (2016) 19, 20
Zivotofsky v. *Clinton*, 566 U.S. 189 (2012) 24

Statutes, regulations, and rule: Page

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 22
Fair Labor Standards Act of 1938,
29 U.S.C. 201 *et seq.* 25
5 U.S.C. 553 22
38 U.S.C. 301(b) 2
38 U.S.C. 301(c)(5) 3
38 U.S.C. 501(a)(1) 2
38 U.S.C. 511(a) 3
38 U.S.C. 1110 2
38 U.S.C. 1114 2
38 U.S.C. 1131 2
38 U.S.C. 1134 2
38 U.S.C. 1154(a)(1) 15
38 U.S.C. 5100 *et seq* 3
38 U.S.C. 5103A(b)(1) 15
38 U.S.C. 5110 2
38 U.S.C. 7101 *et seq* 3
38 U.S.C. 7252 3
38 U.S.C. 7266 3
38 U.S.C. 7292(b)(1) 3
38 U.S.C. 7292(d)(1) 3
38 C.F.R.:
Section 3.156 ..... *passim*
Section 3.156(a) ..... *passim*
Section 3.156(c) ..... *passim*
Section 3.156(c)(1) ..... *passim*
Section 3.156(c)(1)(i) 4
Section 3.156(c)(3) 5, 12, 16
Section 3.304(f) 2
Section 3.400 6
Section 3.400(q)(2) 4, 12, 18

Regulation and rule—Continued: Page

Section 4.127 5

Fed. R. Evid. 401 ..... 16, 17

In the Supreme Court of the United States

No. 18-15

JAMES L. KISOR, PETITIONER

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 869 F.3d 1360. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 20a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2017. A petition for rehearing was denied on January 31, 2018 (Pet. App. 44a-46a). On April 24, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Robert L. Wilkie, Secretary of Veterans Affairs, is automatically substituted for his predecessor, former Acting Secretary of Veterans Affairs Peter O'Rourke. See Sup. Ct. R. 35.3.

STATEMENT

1. Congress has established a framework for providing disabled veterans with monetary benefits. The Department of Veterans Affairs (VA) administers the veterans-benefits program. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011); see 38 U.S.C. 301(b). The Secretary of Veterans Affairs is authorized to adopt regulations implementing federal benefits laws, including regulations regarding the procedure for adjudicating claims and the "nature and extent of proof and evidence" required "to establish the right to benefits." 38 U.S.C. 501(a)(1).

a. A veteran generally is entitled to monthly monetary benefits if he or she is disabled because of injury or disease incurred "in [the] line of duty" during military service. 38 U.S.C. 1110, 1131; see 38 U.S.C. 1114, 1134. These payments generally run from an effective date tied to the later of the VA's receipt of the veteran's claim for benefits or the date the entitlement arose, but various exceptions exist that establish different effective dates. See 38 U.S.C. 5110.

To demonstrate entitlement to benefits, a veteran must show (1) a present disability; (2) a disease or injury that occurred or was aggravated in-service; and (3) a causal connection between the disability and the in-service disease or injury. See *Shedden* v. *Principi*, 381 F.3d 1163, 1166-1167 (Fed. Cir. 2004). To obtain benefits for post-traumatic stress disorder (PTSD), a veteran must show (1) "medical evidence diagnosing the condition"; (2) an "in-service stressor," such as experience in combat; and (3) "a link, established by medical evidence, between current symptoms and [the] in-service stressor." 38 C.F.R. 3.304(f).

b. The VA is charged with adjudicating claims for benefits, including resolving "all questions of law and fact necessary to a decision" whether benefits will be awarded. 38 U.S.C. 511(a). Through its regional offices and claims adjudicators, the Veterans Benefits Administration within the VA develops the record in individual cases and decides claims through a multi-step process. See 38 U.S.C. 5100 *et seq.* Claims for benefits are received and processed by a VA regional office, which renders an initial decision. See *Henderson*, 562 U.S. at 431. A veteran who is dissatisfied with the regional office's decision may seek de novo review by the Board of Veterans' Appeals (Board), a component of the VA. See *ibid.*; see also 38 U.S.C. 301(c)(5), 7101 *et seq.*

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court that has exclusive jurisdiction to review decisions of the Board. 38 U.S.C. 7252, 7266. Decisions of the Veterans Court may in turn be appealed to the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292(b)(1). In reviewing the Veterans Court's decisions, the Federal Circuit has jurisdiction to "decide all relevant questions of law, including interpreting constitutional and statutory provisions," and to "hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims" that the Federal Circuit concludes is unlawful. 38 U.S.C. 7292(d)(1).

c. Under VA regulations, final decisions on claims for benefits may be revisited in certain circumstances. See 38 C.F.R. 3.156. Those regulations distinguish between circumstances in which the VA will "reopen,"

and those in which it will "reconsider," a claim that the agency has previously decided. *Ibid.*

Under Section 3.156(a), a claimant may "reopen a finally adjudicated claim by submitting new and material evidence." 38 C.F.R. 3.156(a). That provision defines "new evidence" as "existing evidence not previously submitted to agency decisionmakers." *Ibid.* Evidence is "material" if, "by itself or when considered with previous evidence of record, [it] relates to an unestablished fact necessary to substantiate the claim." *Ibid.* Section 3.156(a) further provides that "[n]ew and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim." *Ibid.* If a previously decided claim is reopened based on such new and material evidence and the VA grants an award, the effective date of the award is the "[d]ate of receipt of [the] new claim or [the] date entitlement arose, whichever is later." 38 C.F.R. 3.400(q)(2).

In more limited circumstances, the VA's regulations authorize the agency to "reconsider" a previously decided claim, based on service department records that existed at the time of the earlier decision but were overlooked at that time. 38 C.F.R. 3.156(c)(1). The VA will reconsider a claim if it receives any "relevant official service department records that existed" when the agency decided a claim, but which "had not been associated with the claims file." *Ibid.* Such records include "[s]ervice records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name." 38 C.F.R. 3.156(c)(1)(i). If the VA reconsiders a claim and renders an award "based all or in part on" such records, the effective date of the new

award is generally "the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. 3.156(c)(3).

2. a. Petitioner served in the Marine Corps from 1962 to 1966 and fought in the Vietnam War. Pet. App. 2a, 4a. In 1982, he filed a claim for disability benefits, stating that he suffered from PTSD. *Id.* at 2a; C.A. App. 14. Petitioner's psychiatric evaluation stated that he had served in combat in Operation Harvest Moon, where his company had come under attack from snipers and mortars, including "one major ambush which resulted in 13 deaths." Pet. App. 3a (citation omitted). The evaluating psychiatrist diagnosed petitioner with "a personality disorder as opposed to PTSD." *Ibid.* (citation omitted).

In 1983, the VA regional office denied petitioner's claim, concluding based on its review of the evidence that petitioner's claim of PTSD was "not shown by evidence of record." C.A. App. 23 (capitalization altered); see 38 C.F.R. 4.127 ("[P]ersonality disorders are not diseases or injuries for compensation purposes."). Petitioner filed a notice of disagreement with this denial, but he failed to perfect the appeal, and the denial became final. Pet. App. 3a.

b. i. In 2006, petitioner moved to reopen his claim. Pet. App. 4a. While the motion was pending, petitioner submitted a 2007 psychiatric evaluation that had diagnosed him with PTSD. *Ibid.* Petitioner was evaluated by a VA examiner, who also diagnosed him with PTSD. *Ibid.* Petitioner submitted Department of Defense records regarding his military service, medals, and combat history, including his participation in Operation Harvest Moon. *Ibid.*

The VA regional office reviewed petitioner's submissions, along with the evidence submitted with his origi-

nal claim, and granted his claim for benefits at a 50 percent disability rating effective June 5, 2006, the date the agency had received petitioner's reopened claim. Pet. App. 4a & n.3 (citing 38 C.F.R. 3.156(a)); C.A. App. 32-34. After petitioner noted his disagreement with both the disability rating and the effective date, the VA's regional office increased his schedular disability rating to 70% and granted petitioner a 100% rating on an extraschedular basis, but it did not change the effective date. Pet. App. 5a-6a.

ii. Petitioner appealed to the Board, which held that he was not entitled to an earlier effective date. Pet. App. 27a (citing 38 C.F.R. 3.156, 3.400). The Board observed that petitioner's original claim had been denied in 1983 "because he did not have a diagnosis of PTSD" at that time. *Id.* at 30a. It explained that, because petitioner's PTSD diagnosis had been submitted for the first time in proceedings on his June 5, 2006, motion to reopen his claim, that was the "earliest effective date" for his award of benefits. *Id.* at 33a. In challenging the validity and finality of the 1983 denial, petitioner argued that a page of his service records had been destroyed or was never obtained, that the VA's medical examination was inappropriate, that other records were not obtained, and that petitioner's mental state had prevented him from acting before 2006. *Id.* at 33a-34a. The Board rejected these arguments. *Id.* at 34a-39a.

The Board then identified "another way" that petitioner might have challenged the 1983 denial of his claim. Pet. App. 39a. It noted that petitioner might have sought reconsideration of his original claim under 38 C.F.R. 3.156(c)(1), based on relevant service department records—service records and a battalion daily log evidencing petitioner's combat experience in Operation

Harvest Moon—that had existed in 1983 but were not considered at that time. Pet. App. 39a-41a. The Board concluded that this potential argument would have failed because Section 3.156(c)(1) "is not applicable" in the circumstances presented here. *Id.* at 40a.

The Board explained that "[s]ervice connection can be granted only if there is a current disability," and that petitioner's claim had been denied in 1983 "because there was no diagnosis of PTSD," not based on any doubt that petitioner had "suffered a traumatic event during service." Pet. App. 42a. The Board explained that, in order to be "relevant" in this context, service records therefore would need to have addressed petitioner's lack of a PTSD diagnosis in 1983, by at least "suggest[ing] or better yet establish[ing] that [petitioner] ha[d] PTSD as a current disability." *Ibid.* The service records that petitioner later submitted showing his combat experience did not fill that gap, but rather "skip[ped] this antecedent" issue "to address the next service connection requirement of a traumatic event during service." *Ibid.* Because the service records did not cast doubt on the correctness of the 1983 decision, the Board concluded that the records were not "relevant official service department records" under 38 C.F.R. 3.156(c)(1) and thus would not have provided a basis for reconsidering the 1983 decision. Pet. App. 43a.

3. The Veterans Court affirmed. Pet. App. 20a-25a. The court explained that it had "review[ed] the Board's determination of the proper effective date under the 'clearly erroneous' standard of review," and that petitioner "'b[ore] the burden of persuasion on appeal[].'" *Id.* at 25a (quoting *Evans* v. *West*, 12 Vet. App. 396, 401 (1999), and *Hilkert* v. *West*, 12 Vet. App. 145, 151 (1999) (en banc)). The court rejected petitioner's contention

that the Board had "failed to consider and apply the provisions of 38 C.F.R. 3.156(c)." *Id.* at 22a.

Petitioner contended that "the VA's receipt of relevant service records, which had not been previously considered by the VA, required the VA to reconsider his initial claim." Pet. App. 23a (brackets and citation omitted). In rejecting that argument, the Veterans Court explained that the Board had found the newly submitted service department records not to be relevant under Section 3.156(c)(1) because those records did not address whether petitioner had a diagnosis of PTSD in 1983. *Id.* at 23a-24a. The court observed that petitioner "d[id] not assert that the service department records contain a diagnosis of PTSD." *Id.* at 24a. The court "[wa]s not persuaded that the Board incorrectly applied § 3.156(c)," and it concluded "that [petitioner] ha[d] failed to demonstrate error in the Board's findings that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD." *Id.* at 25a.

4. The court of appeals affirmed. Pet. App. 1a-19a. Petitioner contended "that the VA should have reconsidered his claim under" 38 C.F.R. 3.156(c)(1) "and thus afforded him the favorable effective date treatment that the regulation provides," and "that the Veterans Court, like the Board, mistakenly interpreted the term 'relevant' as used in" that regulation. Pet. App. 12a (citation and internal quotation marks omitted). The court of appeals rejected that contention. See *id.* at 14a-19a.

The court of appeals "h[e]ld that the Veterans Court did not misinterpret § 3.156(c)(1)." Pet App. 14a. The court of appeals found the term "relevant" in Section 3.156(c)(1) to be ambiguous. *Id.* at 15a; see *id.* at 15a-17a. The court observed that in some contexts "relevant" can mean "any tendency to make a fact more or

less probable," while in other contexts it means "logically connected and tending to prove or disprove a matter *in issue*." *Id.* at 16a (brackets and citations omitted). The court stated that it would defer to the Board's interpretation, under which "'relevant' means non-cumulative and pertinent to the matter at issue in the case," because that construction was not "'plainly erroneous or inconsistent' with the VA's regulatory framework." *Id.* at 17a (quoting *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007)).

The court of appeals further explained that "the records [petitioner] submitted" in 2006 "were superfluous to the information already existing in his file" and were "not probative here because they d[id] not purport to remedy the defects of his 1982 PTSD claim." Pet. App. 17a-18a. The court observed that petitioner's claim had been denied in 1983 "because the requisite diagnosis of PTSD was lacking," and petitioner "d[id] not urge that the 2006 records provide that diagnosis." *Id.* at 18a. The court accordingly "s[aw] no plain error in the Board's conclusion that the records were not 'relevant' for purposes of § 3.156(c)(1)." *Ibid.*

5. Petitioner sought rehearing en banc, which the court of appeals denied. Pet. App. 44a-46a. Judge O'Malley, joined by Judges Newman and Moore, dissented from the denial of rehearing. *Id.* at 47a-54a. In their view, any ambiguity in Section 3.156(c)(1) should have been resolved in petitioner's favor by applying the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 50a (citation omitted).

ARGUMENT

The court of appeals correctly held that petitioner was not entitled to have his 1982 benefits claim "reconsider[ed]" under 38 C.F.R. 3.156(c)(1) because the records he had submitted concerned only facts that were not in dispute and did not address the dispositive issue of whether petitioner had a PTSD diagnosis in 1983 when the VA denied his claim. That holding does not conflict with any decision of this Court or another court of appeals.

Petitioner argues (Pet. 10-22) that this Court should grant review to overrule its decisions in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997), which hold that courts generally should afford deference to an agency's interpretation of its own regulation. Although the question is an important one that may warrant this Court's review in an appropriate case, see, *e.g.*, *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari); *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210-1211 (2015) (Alito, J., concurring in part and concurring in the judgment), this case would be an unsuitable vehicle in which to reconsider *Seminole Rock* or *Auer*.

Most importantly, because the Board's interpretation of Section 3.156(c)(1) reflects by far the best understanding of the regulation's plain text and purpose, the proper disposition of this case does not turn on whether that interpretation is entitled to deference. The Board correctly determined that a service department record is not "relevant" within the meaning of Section 3.156(c)(1) if it relates only to facts that are undisputed and that do not address a fatal omission in a veteran's prior claim for benefits. Although the court below upheld that ruling under

the deference principles articulated in *Auer* and *Seminole Rock*, were this Court to grant review, the proper disposition would be to affirm regardless of whether *Auer* and *Seminole Rock* were correctly decided. The question whether *Seminole Rock* and *Auer* should be overruled, therefore, has no practical significance in this case.

Petitioner further contends (Pet. 23-28) that the Court should grant review to determine whether, in the specific context of claims for veterans' benefits, other canons of interpretation displace the deference that would otherwise apply under *Seminole Rock* and *Auer*. Because the Board's interpretation reflects the best reading of the regulation's plain text and purpose, the relationship between rules of deference and other interpretive principles is not implicated in this case. In addition, the particular canon that petitioner invokes—that ambiguities in statutory provisions addressing veterans' benefits should be construed in favor of the veteran—is inapplicable because petitioner's reading of the regulation is not plausible in context, and the continuing vitality of that canon is in doubt. It is also uncertain whether that canon even applies to the interpretation of regulations. Petitioner did not advance this argument below, moreover, and the courts below accordingly did not address it. Petitioner has not identified any conflict among the courts of appeals on this question, and even if a conflict existed, this case would be a poor vehicle to address it. Further review is not warranted.

1. The Board correctly determined that, under the plain text of 38 C.F.R. 3.156(c) and its purpose, petitioner was not entitled to have the VA's 1983 denial of his 1982 claim reconsidered, see Pet. App. 39a-43a, and the Veterans Court and court of appeals correctly upheld that determination, see *id.* at 14a-19a, 22a-25a.

a. The VA's regulations allow a veteran whose claim for benefits has been finally adjudicated to "reopen" that claim based on "new and material evidence" supporting the veteran's claim for benefits. 38 C.F.R. 3.156(a). If a reopened claim is granted based on new and material evidence, the award's effective date generally is the later of the date the VA received the motion to reopen or the date entitlement arose. 38 C.F.R. 3.400(q)(2).

The VA's regulations establish a limited exception to that general effective-date rule. If the VA "receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided [a] claim," the agency will "reconsider" the veteran's claim. 38 C.F.R. 3.156(c)(1). If the VA grants reconsideration and enters an award "based all or in part" on such records, the award's effective date is generally the later of the date the VA received the previously decided claim or the date entitlement arose. 38 C.F.R. 3.156(c)(3).

Section 3.156(c) reflects that, when the VA concludes that service records extant at the time of its previous decision were overlooked, and that considering them would produce a different result, the VA is in effect determining that its original decision was incorrect *ab initio*. Section 3.156(c) thus "serves to place a veteran in the position" in which "he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh* v. *McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014). In contrast, when a veteran reopens a claim by submitting new and material evidence that does not consist of such service records, a favorable VA decision on the reopened claim does not imply that the agency's original

denial was inconsistent with the evidence that was available at the time.

b. The VA's regulations do not define the term "relevant service department records" in 38 C.F.R. 3.156(c)(1), and the Board in this case did not articulate a comprehensive definition of the term. Instead, the Board determined that the records petitioner had submitted in 2006, when he sought to reopen the VA's 1983 decision denying his claim for benefits, were not "relevant" in the circumstances of this case. Pet. App. 42a-43a; see *id.* at 19a (explaining that the court of appeals "underst[ood] the Board and Veterans Court as finding only that, on the facts and record of this case, [petitioner's] later-submitted materials were not relevant to determination of *his* claim"). The Board's determination reflects substantially the best reading of the regulation's plain text and purpose.

i. The Board explained that petitioner could not establish service connection and an entitlement to the benefits he had claimed in 1982 unless he showed that he had a "current disability" at that time. Pet. App. 42a. In 1983, the VA had denied petitioner's claim because evidence of his asserted disability was lacking. *Ibid.* The Board noted that "[t]he May 1983 rating decision denied service connection because there was no diagnosis of PTSD." *Ibid.* The lack of such a diagnosis was dispositive.

In 2006, petitioner sought reopening under Section 3.156(a), and he subsequently submitted additional evidence. One document petitioner submitted was a report from a psychiatrist who had examined petitioner in 2007 and had diagnosed him as suffering from PTSD since 1983. Pet. App. 4a; C.A. App. 100-111. The Board properly considered that 2007 diagnosis as new and material evidence under Section 3.156(a). Based on that

and other evidence, the VA awarded petitioner benefits from the date of his request for reopening. But because the 2007 diagnosis had not existed "when [the] VA first decided [petitioner's] claim" in 1983, and because it was not a service record, it could not trigger reconsideration under Section 3.156(c). 38 C.F.R. 3.156(c)(1). Petitioner does not challenge that determination here.

Petitioner also submitted a collection of service department records that detailed petitioner's service in Vietnam and his combat participation in Operation Harvest Moon. Pet. App. 4a. Those documents had existed in 1983 when the VA denied petitioner's initial benefits claim. *Ibid.* In the course of evaluating petitioner's reopening request, the Board *sua sponte* considered whether that evidence would instead warrant reconsideration of the prior benefits denial under Section 3.156(c), which would have resulted in an earlier effective date for benefits. See *id.* at 4a, 39a. The Board correctly concluded, however, that those records were not "relevant" within the plain meaning of Section 3.156(c). *Id.* at 42a-43a.

As the Board explained, "the basis of the denial" of petitioner's claim in 1983 "was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not [petitioner] engaged in combat with the enemy during service." Pet. App. 43a; see C.A. App. 23 ("VA psychiatric examiner has diagnosed intermittent explosive disorder and atypical personality disorder. * * * Post Traumatic Stress Neurosis, claimed by Vet; not shown by evidence of record." (capitalization altered)). The Board determined that the service records did not address the dispositive issue of whether petitioner had a diagnosis of PTSD in 1983, Pet. App. 42a, and petitioner has not disputed that determination. Petitioner did not argue in either the Veterans Court or the court

of appeals that the service records contained such a diagnosis. See *id.* at 18a, 24a. Thus, while the service records confirmed petitioner's combat service, they did not cast doubt on the 1983 decision's "finding that a diagnosis of PTSD was not warranted." *Id.* at 43a.

ii. The Board's commonsense understanding of the term "relevant" in this context is consistent with other uses of that term in the veterans-benefits scheme. For example, the VA is required to make reasonable efforts to obtain "relevant private records" identified in a veteran's claim. 38 U.S.C. 5103A(b)(1). For purposes of that requirement, a record is not "relevant" if it does not "have a reasonable possibility of helping to substantiate the veteran's claim." *Golz* v. *Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010). In assessing a disability's connection to service, the VA likewise must consider all "pertinent medical and lay evidence," 38 U.S.C. 1154(a)(1), which the Federal Circuit has understood to mean "relevant" evidence, *AZ* v. *Shinseki*, 731 F.3d 1303, 1311 (Fed. Cir. 2013). In order to be "relevant" for this purpose, the evidence must "tend to prove or disprove a material fact," and it is not "relevant" if it "does not tend to prove a fact that is of consequence to the action." *Ibid.* (citation omitted). The service records submitted in petitioner's 2006 claim tended to prove a fact (petitioner's combat experience) that had not been disputed and that, without evidence of a PTSD diagnosis, could not have demonstrated a current disability that could support a grant of benefits. Those records therefore did not tend to prove a "fact that is of consequence to the action." *Ibid.* (citation omitted).

The Board's understanding of Section 3.156(c)(1) is reinforced by paragraph (c)(3). That provision states that an "[a]n award" in a case the VA reconsiders is retroactive

to the later of the original date of entitlement or the date the VA received the previously decided claim only if the new award is "made *based all or in part on* the records identified by paragraph (c)(1)," *i.e.*, relevant service records that existed but were not associated with the claims file at the time of the original decision. 38 C.F.R. 3.156(c)(3) (emphasis added). Section 3.156(c) thus "only applies 'when VA receives official service department records that were unavailable at the time that VA previously decided a claim for benefits and *those records lead VA to award a benefit that was not granted in the previous decision.*'" *Blubaugh*, 773 F.3d at 1314 (citation omitted). When service department records are duplicative of evidence already submitted as part of the initial claim, any award of benefits generally would not be "based all or in part on" those service department records.[2]

c. Petitioner challenges (Pet. 21-22) the Board's conclusion that the service department records are not "relevant" within the meaning of Section 3.156(c)(1). His arguments lack merit.

i. Petitioner asserts that "material is 'relevant' for purposes of Section 3.156(c)(1) if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable,'" and that documents therefore "are 'relevant' if they matter to the VA's decision whether to grant benefits." Pet. 21 (brackets and citation omitted); see Pet. 22 (explaining that, under Federal Rule of Evidence 401, evidence is relevant if it has "'any tendency to make a fact more or less probable' when the 'fact is of consequence in

---

[2] This interplay between paragraphs (c)(1) and (3) is not directly implicated in this case, because the VA stated that petitioner's combat service was "verified" based on the service department records. C.A. App. 30.

determining the action'" (quoting Fed. R. Evid. 401)). He further contends that the records here were "relevant" because they "speak to the presence of an in service stressor, one of the requirements of compensation for an alleged service-connected [injury]." Pet. 21 (citation omitted). As applied in this case, however, the Board's interpretation of "relevant" comports with petitioner's definitions, and his service records do not meet his own standard.

As explained above, the Board concluded that the newly discovered service records were not relevant because they did not address the issue—the lack of a PTSD diagnosis—that was dispositive in 1983. The prerequisite to disability benefits that the records did address—whether petitioner had experienced an in-service stressor—was undisputed and, in light of the absence of a PTSD diagnosis, did not affect the outcome. See pp. 13-15, *supra*; Pet. App. 42a-43a; see also *id.* at 18a (whether petitioner "was exposed to an in-service stressor * * * was never at issue in this case"). The Board thus effectively determined that the records did not address "any fact that is *of consequence* to the determination of the action," and that they did not "matter to the VA's decision whether to grant benefits." Pet. 21 (emphasis added; citation omitted).

ii. Petitioner also contends (Pet. 22) that the Board's reading of "relevant" in Section 3.156(c) improperly equates that term with "material" in subsection (a). Pet. 22. That argument lacks merit. Section 3.156(a) permits a veteran to "reopen" any finally adjudicated claim by submitting "new and material evidence." 38 C.F.R. 3.156(a). The regulation defines "[n]ew evidence" as "existing evidence not previously submitted to agency decisionmakers," and it defines "[m]aterial evidence" as "existing evidence that,

by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." *Ibid.* It further provides that "[n]ew and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim." *Ibid.* As explained above, an award on a reopened claim generally is effective as of the later of the date the VA received the motion to reopen or the date entitlement arose. 38 C.F.R. 3.400(q)(2).

In certain limited circumstances, Section 3.156(c)'s procedure for the VA to "reconsider" a prior benefits denial enables a veteran to obtain a more favorable result: an award that is retroactive to the later of the date the original entitlement arose or the date the VA received the previously decided claim, rather than to the date of the request for reopening. In this case, the VA received petitioner's original benefits claim in 1982, and petitioner's request to reopen was filed in 2006. See p. 5, *supra*. Given the context and purpose of Section 3.156(c)'s reconsideration procedure, it would be illogical to interpret "relevant" in Section 3.156(c)(1) to set a *lower* threshold for obtaining retroactive decisions than Section 3.156(a) establishes for reopening claims and obtaining non-retroactive decisions.

Section 3.156(a) provides for a later effective date when a veteran's claim is initially denied but "subsequently granted based on new and material evidence," while Section 3.156(c) mandates an earlier effective date when "the veteran's claim was originally denied due to error or inattention on the part of the government," as where the VA fails to consider pertinent service department records that exist at the time of the original denial.

Sears v. *Principi*, 349 F.3d 1326, 1331 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004). Section 3.156(c) thus serves to "ensure[] that a veteran is not denied benefits due to an administrative error," by placing the veteran in "the position" in which "he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh*, 773 F.3d at 1313. It is entirely clear in this case that, even if the service department records at issue here had been considered in 1983, petitioner still would have been denied benefits at that time based on the lack of any diagnosis of PTSD. Petitioner thus seeks to be placed in a *better* position than he would have occupied if those service department records had been brought to the VA's attention from the outset. That result would be inconsistent with both the text and purpose of Section 3.156(c).

2. Petitioner principally contends (Pet. 10-22) that the Court should grant review to overrule its holdings in *Seminole Rock* and *Auer* that an agency's interpretation of its own regulation generally is entitled to deference. Although this Court has declined review to consider whether to overrule those decisions,[3] this is an important issue that may warrant this Court's review in an appropriate case, as illustrated by separate opinions

---

[3] See, *e.g.*, *Garco*, *supra* (No. 17-225); *Noble Energy, Inc.* v. *Haugrud*, 137 S. Ct. 1327 (2017) (No. 16-368); *Hyosung D & P Co.* v. *United States*, 137 S. Ct. 1325 (2017) (No. 16-141); *Flytenow, Inc.* v. *FAA*, 137 S. Ct. 618 (2017) (No. 16-14); *Gloucester Cnty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (No. 16-273) (granting review on other questions but not on whether to overrule *Auer*); *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607 (2016) (No. 15-861); *Sweeker* v. *Midland Power Coop.*, 136 S. Ct. 990 (2016) (No. 15-748); *Brown* v. *Columbia Gas Transmission, LLC*, 135 S. Ct. 2051 (2015) (No. 14-913); *Stewart & Orchards* v. *Jewell*, 135 S. Ct. 948 (2015) (No. 14-377).

issued and joined by several Members of the Court.[4] This case, however, would be an unsuitable vehicle to consider whether to overrule *Seminole Rock* and *Auer*.

For the reasons discussed above, the Board's determination that Section 3.156(c) is inapplicable to the circumstances of this case reflects by far the best reading of the regulation's text and purpose. See pp. 13-19, *supra*. The outcome of this case therefore would be the same regardless of whether the Board's interpretation of the rule is entitled to judicial deference. Cf. *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring) ("In this suit I have no need to rely on *Auer* deference, because I believe the FCC's interpretation is the fairest reading of the orders in question.").

Indeed, the Board's interpretation of Section 3.156(c) was not simply the *better* reading of the rule, but the *only* permissible construction. The court of appeals deemed Section 3.156(c) ambiguous principally because the parties tendered competing definitions of "relevant." Pet. App. 15a-17a. "Ambiguity," however, "is a creature not of definitional possibilities but of statutory context," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), and "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that

---

[4] See, *e.g.*, *Garco*, 138 S. Ct. at 1052-1053 (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari); *United Student Aid Funds*, 136 S. Ct. at 1608 (Thomas, J., dissenting from the denial of certiorari); *Mortgage Bankers*, 135 S. Ct. at 1210-1211 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213-1225 (Thomas, J., concurring in the judgment); *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 615-616 (2013) (Roberts, C.J., joined by Alito, J., concurring); see also *id.* at 616-626 (Scalia, J., concurring in part and dissenting in part).

makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law," *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citation omitted). No sensible reading of the term "relevant" in Section 3.156(c) could encompass records that do not address a dispositive issue and therefore cannot affect the outcome of the proceeding. That is particularly so because, even if the VA had considered the newly submitted service department records in 1983, the agency would not have awarded benefits at that time given the absence of any diagnosis of PTSD. Petitioner would not have been entitled to benefits unless and until he filled that evidentiary gap. Acceptance of petitioner's argument therefore would not serve Section 3.156(c)'s purpose of placing petitioner in the same position he would have occupied if the VA had considered all the information then in the government's possession when it first adjudicated petitioner's benefits claim. Rather, it would result in an *earlier* effective date for benefits than if the agency had actually considered the service department records when it first adjudicated petitioner's claim in 1983. See pp. 18-19, *supra*.

Even if the Court viewed the regulation as ambiguous, however, the Board's interpretation is clearly the better reading, leaving aside any form of deference. See pp. 13-19, *supra*. The application of deference under *Seminole Rock* and *Auer*, therefore, does not matter in this case. If a court reviewing the Board's interpretation were to find the regulation ambiguous, and the court did *not* apply deference, the court still should uphold the Board's interpretation—that petitioner was not entitled to reconsideration and a retroactive decision—because it reflects a far more natu-

ral reading of the regulation than petitioner's interpretation. If instead the court did apply deference under *Seminole Rock* and *Auer*, it would uphold the Board's interpretation on that basis. Either way, the result would be the same: the court would uphold the Board's interpretation. Accordingly, were this Court to grant review in this case, the proper disposition would be to affirm regardless of whether *Auer* and *Seminole Rock* were correctly decided, see, *e.g.*, *Dahda* v. *United States*, 138 S. Ct. 1491, 1498-1500 (2018) (affirming on alternative ground), which would avoid the need to address petitioner's broader arguments invoking "constitutional concerns," Pet. 16 (citation omitted); see, *e.g.*, *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).[5]

This case also would be a poor vehicle for addressing petitioner's principal argument against deference under *Seminole Rock* and *Auer*. Petitioner's lead argument (Pet. 15-16) is that such deference improperly enables agencies to bypass statutorily prescribed procedures set forth in the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, that govern agencies' promulgation of notice-and-comment regulations, see 5 U.S.C. 553. Petitioner contends (Pet. 15) that "deference provides agencies an end-run around the notice-and-comment procedures required by the Administrative Procedure Act," and "allow[s] agencies to skirt this fundamental legal constraint." He

---

[5] In addition, if the Court granted review on the second question petitioner presents, see pp. 24-25, *infra*, and agreed with petitioner's position that the pro-veteran canon of construction takes precedence over deference under *Seminole Rock* and *Auer*, there would be no reason to consider the applicability of deference in this case. That possibility provides a further reason why this case would be an unsuitable vehicle for considering whether to overrule *Seminole Rock* and *Auer*.

further argues that "*Auer* deference 'frustrates the notice and predictability purposes of rulemaking,'" Pet. 15 (quoting *Garco*, 138 S. Ct. at 1053 (Thomas, J., dissenting from the denial of certiorari), and "allows the agency to control the extent of its notice-and-comment-free domain" by "writ[ing] substantive rules more broadly and vaguely" and then "using interpretive rules unchecked by notice and comment" to give those rules content, Pet. 15-16 (quoting *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment)); see *Talk America*, 564 U.S. at 68-69 (Scalia, J., concurring).

This case would be a poor vehicle for addressing that argument because the concern petitioner raises (Pet. 15-16) about circumventing notice-and-comment procedures is significantly reduced in this context. The VA (through the Board) was interpreting its own procedural rules, and it is well established that agencies may adopt and interpret such rules through adjudications without resorting to rulemaking. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293-294 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). That the VA instead promulgated a regulation, and subsequently clarified (*sua sponte*) here how that rule applied in the particular circumstances of petitioner's case, mitigates the concern petitioner raises and thus would make this case an unsuitable vehicle for addressing that argument.[6]

---

[6] Petitioner's contention (Pet. 19) that deference is less appropriate in this case because "the VA is a *party*" is similarly incorrect. The Board acted as an agency adjudicator in the administrative phase of these proceedings. Its function was to determine on behalf of the VA the proper effective date of petitioner's benefits award, not to defend the agency's decision in subsequent court proceedings. The VA's authority to construe its procedural rules in cases before the agency therefore is at its apex here.

3. Petitioner alternatively contends (Pet. 23) that deference under *Seminole Rock* and *Auer* should be displaced by "a substantive canon of construction." See Pet. 23-28. That question does not warrant review at this time, and this case would be a poor vehicle to address it.

a. Petitioner did not argue before the VA, the Veterans Court, or the court of appeals panel that deference should be overcome by the canon to resolve ambiguities in favor of veterans. Consequently, none of those tribunals addressed the question. Petitioner raised the argument for the first time in his rehearing petition, C.A. Pet. for Reh'g 12-15, and it was discussed only by the judges who dissented from the denial of rehearing, Pet. App. 50a-51a (O'Malley, J., joined by Newman and Moore, JJ., dissenting from the denial of rehearing en banc). As "a court of final review and not first view," this Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citations omitted). The Court is particularly reluctant to address questions that were not timely pressed in the lower courts. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Glover* v. *United States*, 531 U.S. 198, 205 (2001). And while petitioner contends (Pet. 23-27) that the circuits have reached inconsistent conclusions regarding the interplay between other interpretive canons and various forms of judicial deference to agency decisions, he does not identify any court of appeals' decision holding that the pro-veteran canon overrides principles of deference under *Seminole Rock* and *Auer*.

b. As explained above, the applicability of deference has no practical significance in this case because the Board's reading reflects by far the best interpretation

of the pertinent rule. See pp. 19-22, *supra*. In applying the pro-veteran canon to the interpretation of ambiguous statutory provisions, this Court has cautioned that the canon cannot be used to "distort the language of" the statute. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); see *id.* at 286 (declining to "read into" the statute a policy favorable to veterans when the text and interplay of the statutory sections would not bear that interpretation). Whatever role the canon might play in resolving ambiguities at the margin, it could not justify construing Section 3.156(c) in a manner that is inconsistent with its text and purpose.

c. Petitioner's argument also depends on the premise that the pro-veteran canon applies to ambiguous VA regulations as well as to ambiguous statutory provisions. That premise is not free from doubt, and it was not discussed below. And even with respect to the interpretation of ambiguous statutes, this Court's recent decisions may call the pro-veteran canon into question. Cf. *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018) (rejecting canon that exceptions to the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, should be read narrowly). For those reasons as well, the second question presented in the petition for a writ of certiorari does not warrant this Court's review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
DANIEL AGUILAR
Attorneys

OCTOBER 2018

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief for Petitioner 1

Conclusion 12

TABLE OF AUTHORITIES

Page(s)

Cases

Bond v. *United States*,
564 U.S. 211 (2011) 2

Department of Transp. v. *Association of Am. R.R.s*,
135 S. Ct. 1225 (2015) 2

Fitzgerald v. *Barnstable Sch. Comm.*,
555 U.S. 246 (2009) 2

Hicks v. *Shulkin*,
2017 WL 6617125 (Vet. App. 2017) 9

Hodge v. *West*,
155 F.3d 1356 (Fed. Cir. 1998) 11

O'Donnell v. *Shinseki*,
2012 WL 1660827 (Vet. App. 2012) 9

Talk Am., Inc. v. *Michigan Bell Tel. Co.*,
564 U.S. 50 (2011) 3

Zivotofsky v. *Clinton*,
566 U.S. 189 (2012) 2

Statutes and Regulations

38 C.F.R.
§ 3.156(a) 5, 10
§ 3.156(c) 5
§ 3.156(c)(1) 5, 6, 9, 10
§ 3.156(c)(3) 5, 7, 11
§ 3.304(f) 6, 10
§ 3.400(q)(2) 5

38 U.S.C.
§ 5103A(b)(1) 9
§ 7292 12

Other Authorities

Fed. R. Evid. 401 5

Matthew J. Friedman, MD, PhD, *PTSD History and Overview*, Nat'l Center for PTSD, U.S. Dep't of Veterans Affairs, https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp 9

New and Material Evidence, 70 Fed. Reg. 35,388 (June 20, 2005) 4, 10

REPLY BRIEF FOR PETITIONER

The Federal Circuit resolved this case solely on the basis of *Auer* deference; the court of appeals ruled in favor of the VA merely because "neither party's position" was "unreasonable." Pet. App. 17a. This is thus a compelling vehicle to revisit *Auer*, a doctrine that the government conspicuously does not defend. In fact, the government acknowledges that the viability of *Auer* is an "important" question "that may warrant this Court's review." Opp. 10.

Rather than endorse the decision below, the government opposes certiorari with an argument neither addressed nor adopted by the court of appeals. The government contends that it would prevail even under a *de novo* construction of the relevant regulation. This contention is doubly flawed.

First, it is no reason to deny review. Because the government relied on *Auer* below, and because it was the sole basis on which the Federal Circuit ruled, this case presents a clean opportunity for the Court to revisit that doctrine. Whether the government would win without *Auer* is a subsequent question. Indeed, the Court may leave that issue for remand.

Second, the government's construction of Section 3.156(c) is flatly wrong. The government seeks to erect a limitation on a veteran's claim for benefits that exists nowhere in the regulatory text. Petitioner's construction, by contrast, accords with the regulation's plain meaning. The question is certainly substantial enough to warrant resolution.

The Court should resolve whether an agency's interpretation of its own regulation deserves deference. This case is an appropriate vehicle for doing so.

1. In opposing certiorari, the government advances effectively one argument: that it would prevail even absent *Auer*. See Opp. 10-23. In making this argument, the government expressly rejects the Federal Circuit's reasoning. Although the court of appeals held that both parties advanced reasonable constructions of the regulation (Pet. App. 17a), the government now contends that its position is "not simply the *better* reading of the rule, but the *only* permissible construction." Opp. 20.

While the government is wrong substantively, its quarrel with the opinion below is no reason to deny review. As the government underscores (Opp. 24), the Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012). The Court routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason. See, *e.g.*, *Department of Transp.* v. *Association of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (leaving for remand alternative grounds); *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (same).

That is the proper course here. The Court should review the issue that governed below—*Auer*. If the Court reverses *Auer*, it may leave *de novo* construction of Section 3.156(c) for remand. When the Court "reverse[s] on a threshold question," it "typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky*, 566 U.S. at 201. See also, *e.g.*, *Bond* v. *United States*, 564 U.S. 211, 214 (2011).

The Court should be especially skeptical of the government's argument opposing certiorari given the history of this case. The court of appeals relied on *Auer* because the government asked it to do so. Below, quoting *Seminole Rock*, the government argued that "an agency's construction of its own regulations is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Gov't C.A. Br. 28. The government ultimately contended that "the VA's interpretation of [Section] 3.156(c)(1) * * * is entitled to deference." *Id.* at 29. Earlier in this case, the government thought *Auer* was relevant. In resting its decision on *Auer*, the court of appeals agreed.

Having expressly embraced—and won with—*Auer* deference below, the government's current effort to distance this case from *Auer* rings hollow. The government's decision to abandon the argument it advanced earlier is all the more reason why this Court's review is warranted. Otherwise, the government will continue to use *Auer* offensively in the lower courts but then avoid review by contending before this Court that it might have won regardless.

The government's reference (Opp. 20) to Justice Scalia's concurring opinion in *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U.S. 50, 67 (2011), is misplaced. There, Justice Scalia explained why he did not suggest revisiting *Auer* at that time: "We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so." *Id.* at 69. Petitioner asks the Court to reconsider *Auer*.

The government makes a second, half-hearted vehicle argument. Opp. 22-23. It recognizes our contention that the Court should revisit *Auer*, in part,

because *Auer* encourages agencies to write vague regulations and then supply content to those regulations via interpretive decisions that are not subject to notice-and-comment rulemaking. See Pet. 15-16. In this way, *Auer* deference allows agencies to circumvent the critical safeguards contained in the Administrative Procedure Act. *Ibid.*

The government rejoins by insisting that this is a mere "procedural rule[]" and that "it is well established that agencies may adopt and interpret such rules through adjudications without resorting to rulemaking." Opp. 23. But Section 3.156(c) is not merely a "procedural rule"—its construction governs whether petitioner, and all those like him, are entitled to retroactive disability benefits. Indeed, the agency itself thought that the promulgation of Section 3.156(c) was subject to the notice-and-comment requirements of the APA; the agency *did* subject the regulation to notice-and-comment. See *New and Material Evidence*, 70 Fed. Reg. 35,388 (June 20, 2005).

This case therefore highlights a fundamental defect of *Auer*. The agency promulgated a vague regulation using APA notice-and-comment rulemaking; then, without notice-and-comment, the agency changed the regulation's meaning; and, finally, the agency defended its action via reliance on *Auer* deference. This Court should revisit *Auer* to foreclose this circumvention of the APA.[1]

---

[1] The second question presented is no obstacle to review. Cf. Opp. 22 n.5. The question of which comes first—*Auer* deference or the pro-veteran canon—presupposes the existence of *Auer* deference. Per the petition, the second question is relevant only if the Court "retains *Auer*." Pet. 23.

2. The government's construction of Section 3.156(c) is flatly wrong. The government disregards core aspects of the regulatory text, and its policy-based arguments are irreconcilable with the regulation's plain meaning. The question certainly warrants resolution without *Auer* deference.

The VA may revisit past denials of benefits by either "reopen[ing]" a claim pursuant to 38 C.F.R. § 3.156(a) or "reconsider[ing]" a claim pursuant to 38 C.F.R. § 3.156(c). The latter procedure is more favorable to veterans because it results in retroactive benefits. Compare 38 C.F.R. § 3.400(q)(2), with *id.* § 3.156(c)(3).

The reconsideration process is limited to circumstances where "relevant official service department records" existed at the time of the claim but had not been "associated" with the claim—and thus were not considered. 38 C.F.R. § 3.156(c)(1). That is to say, the more veteran-friendly provision applies when the VA made an "administrative error" (Opp. 19) by failing to consider "relevant" records that the government possessed at the time of its initial decision.

a. In petitioner's view, Section 3.156(c)(1) means just what it says: if the VA failed to consider records in the government's possession "relevant"[2] to an element of the claim determination, the VA will reconsider its past denial. 38 C.F.R. § 3.156(c)(1). If the VA later awards benefits, based at least "in part" on the relevant records the VA failed to previously evaluate, then the veteran is entitled to retroactive benefits. *Id.* § 3.156(c)(3). See also Pet. 21. Nothing in the

---

[2] "Relevant" is properly understood as "any tendency to make a fact more or less probative." Fed. R. Evid. 401; Pet. 22.

regulation provides additional qualification on what constitutes a "relevant" record.

Two aspects of the regulatory text compel the conclusion that petitioner is entitled to the benefit of Section 3.156(c)(1).

First, the records at issue here are "relevant" in the ordinary sense of the term. Petitioner's "Combat History, Expeditions, and Awards Record," for example, documents "his participation in Operation Harvest Moon" (Pet. App. 4a), which is the military operation that caused his PTSD (see *id.* at 3a). This record is certainly "relevant" (38 C.F.R. § 3.156(c)(1)) to "the presence of an in service stressor," which is an essential element of the disability claim. Pet. App. 16a. See also Pet. 21; 38 C.F.R. § 3.304(f) ("Service connection for posttraumatic stress disorder requires * * * credible supporting evidence that the claimed in-service stressor occurred.").[3]

The regulation itself, moreover, specifies that these records qualify as "relevant." Section 3.156(c)(1)(i) provides that "relevant official service department records" include "[s]ervice records that are related to a claimed in-service event." 38 C.F.R. § 3.156(c)(1)(i). The records the VA overlooked here are just that—service records related to the in-service event that caused petitioner's PTSD. The regulation thus directly states that these records qualify as "relevant." We made this argument earlier (Pet. 21), but the government fails to respond. Its inability to

---

[3] The government is wrong to assert (Opp. 16-17) that the evidence here does not meet our test. A veteran must demonstrate an in-service stressor to obtain benefits (38 C.F.R. § 3.304(f)), and these records are plainly "relevant" to that element.

muster a response to the regulation's plain text speaks volumes.

Second, in granting petitioner benefits, the VA's decision *was* "based" "in part" on the records the VA previously failed to associate with petitioner's claims file. 38 C.F.R. § 3.156(c)(3). On March 25, 2009, the VA issued petitioner a "Decision Review Officer Decision." C.A. App. 41-45. That decision was expressly based on "consideration and review of the evidence of record." *Id.* at 43. Under a section titled "evidence," the VA identified that the evidence of record included petitioner's "DD Form 214," a "copy of service personnel record," and a "copy of citation for heroic participation in Operation Harvest Moon." *Id.* at 42. These are the overlooked records at issue. See Pet. 6. The government even acknowledges that the VA relied, at least in part, on these records when it awarded petitioner benefits. Opp. 16 n.2 (admitting that "petitioner's combat service was 'verified' based on the service department records") (quoting C.A. App. 30).[4] Section 3.156(c)(3) therefore confirms that petitioner is entitled to retroactive benefits.

With our construction, Section 3.156(c) yields a sensible, easy-to-administer rule. If the VA earlier committed an administrative error by overlooking records the government possessed "relevant" to an

---

[4] The government attempts to escape the implication of its concession by contending that its asserted "interplay between paragraphs (c)(1) and (3) is not directly implicated in this case." *Ibid.* We do not understand what this phrase is intended to mean. The VA's decision awarding petitioner benefits was "based * * * in part on" records that the VA earlier overlooked. 38 C.F.R. § 3.156(c)(3). This should be conclusive of the operative question here.

element of the veteran's claim, the veteran should receive retroactive benefits when the VA later grants a disability claim based at least "in part" on those overlooked records. This veteran-friendly regulation remediates past errors made by the VA.

b. The government, however, seeks to engraft an additional, causative element onto the regulation. In the government's view, a veteran is entitled to the benefit of Section 3.156(c) only if the veteran proves that the VA would have granted the veteran benefits if it had considered the record at issue. Opp. 12-15, 18-19. The government would require a speculative, counterfactual inquiry whenever a veteran invokes Section 3.156(c). There is no textual basis for erecting this extra hurdle to a veteran's claim for benefits.

Rather than starting with the text, the government begins with an apparent policy argument. Opp. 13-15. The government argues (Opp. 14) that the VA denied petitioner's claim in 1983 because it found "that a diagnosis of PTSD was not warranted." Pet. App. 43a. The government asserts that records describing "petitioner's combat service"—including his participation in an event that resulted in the death of 13 others—were not relevant to this finding. Opp. 14-15. On the basis of this observation, the government asserts that the Board's legal determination is correct. *Ibid.*

Setting aside the government's failure to engage with the regulatory text, this argument is deeply flawed on its own terms. The government cannot divorce evidence of petitioner's in-service stressor from his PTSD diagnosis. According to the VA itself, "one cannot make a PTSD diagnosis unless the patient has actually met the 'stressor criterion,' which means

that he or she has been exposed to an event that is considered traumatic." Matthew J. Friedman, MD, PhD, *PTSD History and Overview*, Nat'l Center for PTSD, U.S. Dep't of Veterans Affairs, https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp. In DSM-5, on which the VA relies, "criterion A" for a PTSD diagnosis is presence of a "stressor." *Hicks* v. *Shulkin*, 2017 WL 6617125, at *3 (Vet. App. 2017).[5] While the presence of a stressor may not be a sufficient basis to diagnose PTSD, it is undeniably "relevant" to that diagnosis in the ordinary sense of the word.

To the extent the government offers a legal standard, it is that, to qualify as "relevant," the records must "cast doubt" on the earlier decision. Opp. 15. See also Opp. 7. For the reasons we just explained, petitioner's overlooked records do tend to "cast doubt" on the VA's earlier finding that petitioner did not have PTSD. More to the point, the government never explains the textual basis on which it draws its "cast doubt" test. No textual support exists. The regulation speaks broadly of records that are "relevant"—and it specifically defines "relevant" records as including "[s]ervice records that are related to a claimed in-service event." 38 C.F.R. § 3.156(c)(1)(i).[6]

---

[5] See also *O'Donnell* v. *Shinseki*, 2012 WL 1660827, at *1 (Vet. App. 2012) ("A VA medical examination * * * concluded that he 'does not meet DSM–IV criteria for the diagnosis of PTSD, in terms of a specific, identified stressor that meets Criterion A, which is required for the diagnosis to be made.'").

[6] The government's reference (Opp. 15) to the use of the term "relevant" in an unrelated statute, 38 U.S.C. § 5103A(b)(1), which describes "relevant private records," only reinforces our argument. Citing Federal Circuit precedent, the government

Section 3.156 as a whole, moreover, refutes the government's argument. See Pet. 22. Section 3.156(a), which permits the VA to "reopen" a claim, requires a veteran to show "new and material evidence." "Material evidence" is "evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. § 3.156(a). And "new and material" evidence does not include evidence that is "cumulative" or "redundant" of what was previously considered. *Ibid.* That is, "new and material" evidence is evidence that would "cast doubt" on the VA's prior decision.

In construing "relevant" as used in Section 3.156(c), the government seeks to import the "new and material" standard from Section 3.156(a). But the government has no textual basis for doing so. The regulation's use of different language within the same Section reflects a conscious choice. The term "relevant" as used in Section 3.156(c) must mean something different than "new and material." In fact, Section 3.156(c) previously *did* contain the "new and material" standard. In 2005, the VA amended the regulation to replace it with a broader standard turning on "relevant" evidence. See 70 Fed. Reg. 35,388.

Disregarding the text entirely, the government's only apparent answer is made-up policy. "[I]t would be illogical," the government posits, "to interpret 'relevant' in Section 3.156(c)(1) to set a *lower* threshold

---

contends that "a record is not 'relevant' if it does not 'have a reasonable possibility of helping to substantiate the veteran's *claim*.'" Opp. 15 (emphasis added). The records here meet this test. Petitioner's "claim" is for PTSD disability benefits, one element of which is the presence of an in-service stressor. 38 C.F.R. § 3.304(f). These records "substantiate" this element.

for obtaining retroactive decisions than Section 3.156(a) establishes for reopening claims and obtaining non-retroactive decisions." Opp. 18.

This contention is wrong out-of-the gate, as the VA must still issue an "award" (38 C.F.R. § 3.156(c)(3)) for a veteran to receive any relief, subject to all the elements of the particular claim. Beyond that, there is an obvious—and entirely logical—reason to interpret the regulation in accord with its plain text. Section 3.156(c) (unlike Section 3.156(a)) applies only where, as the government puts it, the VA committed an "administrative error" (Opp. 19) by failing to consider records during its initial adjudication. Because Section 3.156(c) is remedial, it is sensible to interpret the regulation as resolving past VA errors in the veteran's favor—without requiring a speculative, counter-factual inquiry into what the VA may have done years or decades prior.

c. If any doubt remains, the pro-veteran canon should tip the scale for petitioner. Pet. 22. The government retorts that, because it has "by far the best interpretation of the pertinent rule," the veteran's canon has no role. Opp. 24-25. Needless to say, we disagree with the government's assessment of its case. The government asserts—without authority—that the canon may not apply to regulations. The Federal Circuit disagrees. *Hodge* v. *West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998). It would be bizarre indeed if the pro-veteran canon applied to Congress only—and not the VA.

3. The Court should also grant review of the second question presented. If, contrary to our principal argument, the Court retains *Auer*, it should confirm that *Auer* applies only after a court has exhausted

every other tool of construction, including the pro-veteran canon. This claim is not waived, as "[i]t is hard to imagine how a party can waive the question of the correct legal standard to apply." Pet. App. 53a. Finally, there is no conflict on the specific intersection of *Auer* and the pro-veteran canon (Opp. 24) because the Federal Circuit has jurisdiction over all veterans' appeals. 38 U.S.C. § 7292.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Petitioner

NOVEMBER 2018

No. 18-15

In the

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE,
Acting Secretary of Veterans Affairs,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional
Jurisprudence
c/o Dale E. Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING THE WRIT 2

I. Separation of Powers Is One of the Most Important Structural Features of the Constitutional Design to Protect Liberty. 2

II. *Seminole Rock* and *Auer* Deference Violate Separation of Powers 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Auer v. Robbins,
519 U.S. 452 (1997) 1, 2, 6, 7

Berninger v. FCC,
No. 17-498 6

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 1, 3

Buckley v. Valeo,
424 U.S. 1 (1976) 5

Chevron USA Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 2, 6

Christopher v. SmithKline Beecham,
567 U.S. 2156 (2012) 1

Decker v. Nw. Envtl. Def. Ctr.,
133 S.Ct. 1326 (2013) 2, 3, 9

Garco Const., Inc. v. Speer,
138 S.Ct. 1052 (2018) 1, 2

INS v. Chadha,
462 U.S. 919 (1983) 4, 5

Kilbourn v. Thompson,
103 U.S. 168 (1880) 5

Marbury v. Madison,
5 U.S. (Cranch) 137 (1803) 2,7, 8

Michigan v. EPA,
135 S. Ct. 2699 (2015) 2

Miller v. Johnson,
515 U.S. 900 (1995) 7

Mistretta v. United States,
488 U.S. 361 (1989).....4, 5

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015).....1

Talk America, Inc. v. Michigan Bell Tel. Co.,
564 U.S. 50 (2011).....2

Dept. of Transportation v. Ass'n of American Railroads,
135 S. Ct. 1225 (2015).....1

United States v. Nixon,
418 U.S. 683 (1974).....6, 8

United Student Aid Funds, Inc. v. Bible,
136 S.Ct. 1607 (2016).....2

Other Authorities

Adams, John, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (The Lawbook Exchange Ltd. 3rd ed., 2001).....5

Blackstone, William, COMMENTARIES ON THE LAWS OF ENGLAND (William S. Hein & Co. ed., 1992).....4, 8

Hamilton, Alexander, Federalist 9, THE FEDERALIST PAPERS.....4

Jefferson, Thomas, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS (Lester J. Cappon ed., 1959)..4

Locke, John, THE SECOND TREATISE ON GOVERNMENT (Thomas P. Peardon, ed.,1997).....4

Madison, James, Federalist 47, THE FEDERALIST PAPERS.....4

Madison, James, Federalist 48, THE FEDERALIST PAPERS.....4

Madison, James, Federalist 51, THE FEDERALIST PAPERS 4, 5

Montesquieu, THE SPIRIT OF THE LAWS (Franz Neumann ed. & Thomas Nugent trans., 1949) 3

Rules

Sup. Ct. Rule 37.2(a) 1

Sup. Ct. Rule 37.6 1

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental separation of powers principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing similar separation of powers issues, including *Garco Const., Inc. v. Speer*, 138 S.Ct. 1052 (2018) (certiorari denied); *Department of Transportation v. Ass'n of American Railroads*, 135 S. Ct. 1225 (2015); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); and *Christopher v. SmithKline Beecham*, 567 U.S. 2156 (2012).

SUMMARY OF ARGUMENT

The doctrine of deference to an agency's interpretation of its own regulations, first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and solidified in *Auer v. Robbins*, 519 U.S. 452 (1997), has proved to be a violation of core separation of powers principles. It exacerbates the problem of delegation of lawmaking powers to unelected executive officials, already at the constitutional breaking point under step two of the *Chevron* doctrine, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467

---

[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

U.S. 837 (1984). It also deprives the judiciary of its authority to interpret the laws, an authority that has been recognized for over two hundred years. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). Several members of this Court have in recent years acknowledged the constitutional problems with the *Auer* deference doctrine, and this case is a good vehicle to reconsider and overrule it.

REASONS FOR GRANTING THE WRIT

I. Separation of Powers Is One of the Most Important Structural Features of the Constitutional Design to Protect Liberty.

Several members of this Court have recently recognized the risk posed to the Constitution's core separation of power principles by various doctrines of deference to the unelected federal bureaucracy. *Auer* deference should be on its "last gasp." *Garco Const., Inc.*, 138 S.Ct. at 1053 (Thomas, J. dissenting from denial cert.); *United Student Aid Funds, Inc. v. Bible*, 136 S.Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of cert.). Even the author of the opinion that gave its name to the doctrine announced that he had abandoned the doctrine. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in judgment) (announcing that he would be "abandoning" the holding in *Auer v. Robbins*, 519 U.S. 452 (1997), that he himself authored); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620-21 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* is . . . a dangerous permission slip for the arrogation of power" (citing *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring)); Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96

Colum. L. Rev. 612 (1996)); *see also Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment) ("these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations"); *id.* at 1210-11 (Alito, J., concurring in part and concurring in the judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine [*Auer*'s predecessor] may be incorrect. . . . I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *Decker*, 133 S.Ct. at 1338 (Roberts, C.J., joined by Alito, J., concurring) ("It may be appropriate to reconsider that principle in an appropriate case").

There is good reason for this willingness to reconsider *Auer*. The rule announced in *Seminole Rock* and confirmed in *Auer* is a direct attack on the principle of separation of powers. This structural feature of the federal constitution—considered vital by the Framers and Ratifiers—is the feature that best preserves liberty.

Separation of the powers of government is a foundational principle of our constitutional system. The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein

& Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government. James Madison, Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003); James Madison, Federalist 47, THE FEDERALIST PAPERS, *supra at* 298-99 ; Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra at* 67 ; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches; vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in this Supreme Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. James Madison, Federalist 48, THE FEDERALIST PAPERS, *supra* at 305. Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id.* Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380.

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. Any attempt by any branch of government to encroach on powers of another branch, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The judicial branch, especially, is called on to enforce this essential protection of liberty. *Chadha*, 462 U.S. at 944-46. The Constitution was designed to pit ambition against ambition and power against power. James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 319; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). When this competition of interests does not stop an encroachment, however, it is the duty of this Court to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199.

II. *Seminole Rock* and *Auer* Deference Violate Separation of Powers.

The judiciary, like any other branch, must jealously guard its rightful authority. It has readily done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). The judiciary cannot abdicate its constitutional responsibility to interpret the law.

United States v. Nixon. 418 U.S. 683, 704 (1974) ("[T]he judicial power . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers.").

The deference shown under *Seminole Rock* and *Auer*, however, does just that by ceding judicial power to the executive. This allows the concentration of power feared by the founding generation. *See* Manning at 674-75. As Professor Manning notes, *Seminole Rock* deference also dilutes political constraints on agency action, allowing narrow interest groups to wield out-sized influence on the agency. *Id.* at 675.

Congress may be able to delegate part of its law-making function to an agency by "leaving a gap for the agency to fill" through a formal process of notice-and-comment rulemaking. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).[2] The purpose in doing this is to allow an agency to exercise its unique expertise in the service of the policy adopted by Congress. Once the agency

---

[2] This should be distinguished from deferring to administrative diktats that the statutory text means one thing on one day, and something completely different on another day. *Compare National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 973 (2005) (upholding FCC determination that broadband internet providers were computer service providers rather than telecommunication providers under the Telecommunications Act of 1996) *with United States Telecom Ass'n v. FCC*, 825 F.3d 674, 695 (D.C. Cir. 2016) (upholding FCCs new ruling that broadband internet providers are now telecommunications providers rather than computer services providers – under the same statutory scheme) (petition for writ of certiorari pending, *Berninger v. FCC*, No. 17-498).

has "filled the gap" left by Congress through the formal rulemaking process, however, no deference should be shown to any subsequent interpretation (or reinterpretation) of those regulations. If an agency finds the need to reverse its policy or significantly alter its position, it has the power to do so. It only needs to promulgate a new rule, through the notice-and-comment process, explaining the reasons for its change. *State Farm*, 463 U.S. at 42; *Fox Television Stations*, 556 U.S. at 514-15.

The power to interpret the meaning of a regulation—as a legal text—properly belongs to the judiciary, not the agency that promulgated that regulation. Of course, in applying a regulation, the agency must make some interpretation in practice. But that necessary executive function cannot exclude the judiciary from exercising its constitutional authority. Continuing to give controlling deference under *Auer* and *Seminole Rock* to agency interpretations transfers the judiciary's constitutional power to the executive.

From the early days of the republic, this Court has agreed that the courts have both the power and duty to interpret the law. Most famously in *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803), this Court declared "[i]t is emphatically the province and duty of the judicial department to say what the law is."

Later cases have relied on these principles to reject a call for deference to legal interpretations by the Department of Justice. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995). Each branch of government must support and defend the Constitution and thus must interpret the Constitution. The Courts may not, however, cede their judicial power to interpret the laws to

the Executive. See *United States v. Nixon*, 418 U.S. 683, 704 (1974).

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. Federalist 51, *supra* at 269. This explains why this Court in *Marbury* did not simply declare legal interpretation to be a judicial power. Instead, the Court ruled that it was the duty of the judiciary to exercise that power. *Marbury*, 5 U.S. at 177. In order to keep the political branches in check, this Court may not surrender its power to interpret the law to either of the political branches. The failure to exercise this duty would be an invitation to "partiality and oppression." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Bk 1 § 2, at 58 The rule of controlling deference to agency interpretation of ambiguous regulations, however, is a surrender of judicial power and a decision to cede to the Executive the judicial power.

Chevron deference, when applied to an agency, using its specialized expertise, to merely fill a gap in the Congressional scheme, does not raise the same concerns for separation of powers present here. Under this original purpose of *Chevron* deference, the Court does not cede its power to interpret the law. Instead, the Court recognizes that Congress gives agencies clear policy guidance and then relies on those agencies to employ their specialized expertise (such as what level of exposure to a particular chemical is harmful) to fill in gaps in the legislative scheme. Until the agency has filled in those gaps in, the statute may not yet be complete in the sense that specialized expertise must be brought to bear on the problems that Congress sought to address. This use of agency expertise

by Congress to fill in details in the regulatory scheme is not a part of the judicial function.

Once the agency has issued a regulation that carries the force of law, however, it then falls to the courts to interpret the regulation. In other words, it is the judiciary's job "to declare the sense of the law." Federalist 78, *supra* at 405.

Granting deference to the agency to interpret its own ambiguous regulation cedes the judicial function to the Executive. This is an invitation to agencies to avoid the expense and bother of rulemaking proceedings when it wants to change its policy. Instead of going through the process to allow public participation and judicial review of the change, it can instead merely change how it interprets its existing regulations.

Denying "controlling deference" to an agency interpretation does not mean that the courts must ignore long-standing agency interpretations and practices. Those remain important interpretative tools. Yet the job of interpreting the legal text will remain with the courts. To do otherwise results in a failure of the duty of the judicial branch of government "to declare the sense of the law" and thus violates the separation of powers required by the Constitution.

CONCLUSION

Several members of this Court have already acknowledged the significant separation of powers problems that result from the increasingly broad reliance on deference doctrines by the unelected administrative bureaucracy. As the Chief Justice noted, the issue of *Auer* deference "is a basic one going to the heart of Administrative Law." *Decker*, 568 U.S. at

1339 (Roberts, C.J., concurring). The petition for writ of certiorari should be granted so that this Court can answer this basic question and restore the separation of powers principles that lie at the core of our constitutional system of government.

July 2018 Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE, ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H. St. NW
Washington, DC 20062
(202) 463-5337

Mark W. Mosier
Counsel of Record
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
mmosier@cov.com
(202) 662-6000

Kathryn Cahoy
COVINGTON & BURLING LLP
333 Twin Dolphin Drive
Redwood Shores, CA 94065
(650) 632-4700

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. *Auer* Deference Harms The Business Community By Increasing Regulatory Uncertainty 5

II. *Seminole Rock* And *Auer* Should Be Overruled 8

A. *Seminole Rock* And *Auer* Are Contrary To The APA 8

B. *Seminole Rock* And *Auer* Violate Separation-Of-Powers Principles 10

C. *Seminole Rock* And *Auer* Cannot Be Justified On Policy Grounds 11

III. This Case Is An Excellent Vehicle To Reconsider *Seminole Rock* And *Auer* 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

Bible v. United Student Aid Funds, Inc.,
799 F.3d 633 (7th Cir. 2015) 7, 8

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Chase Bank USA, N.A. v. McCoy,
562 U.S. 195 (2011) 7

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 6, 7

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 5

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) 2, 3, 10, 13

F.C.C. v. Fox Television Stations, Inc.,
567 U.S. 239 (2012) 5

Flytenow, Inc. v. FAA,
808 F.3d 882 (D.C. Cir. 2015) 12

Garco Constr., Inc. v. Speer,
138 S. Ct. 1052 (2018) 3, 8, 10, 11

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016) 6, 10, 11

Kolbe v. BAC Home Loans Servicing, LP,
738 F.3d 432 (1st Cir. 2013) 12

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S. 144 (1991) 11

Montejo v. Louisiana,
556 U.S. 778 (2009) 9

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 7

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015) 3, 9, 11, 13

Pub. Citizen v. U.S. Dep't of Justice,
491 U.S. 440 (1989) 12

United Student Aid Funds, Inc. v. Bible,
136 S. Ct. 1607 (2016) 8

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.,
550 U.S. 81 (2007) 12

Statutes

5 U.S.C. § 553 5

5 U.S.C. § 706 ..... 4, 9, 10

38 U.S.C. § 501 5

38 U.S.C. § 502 9

38 U.S.C. § 7261 9

38 U.S.C. § 7292 9

Other Authorities

About Hiring Our Heroes, https://www.hiringourheroes.org/about-hiring-our-heroes/ (last visited July 31, 2018) 2

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of concern to the business community.

The business community has a particular interest in the interpretive principles applied to federal regulations. Given the breadth of government regulations, virtually every Chamber member has at least some portion of its business regulated by federal agencies. These businesses have a strong interest in seeing the Court revisit its decisions giving deference to agencies' interpretations of their regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties were timely notified of *amicus's* intent to file this brief and consented to its filing.

The Chamber also has an interest in this case because it involves a veteran who was wrongly denied disability benefits. The Chamber actively supports veterans through "Hiring Our Heroes," a nationwide initiative launched in March 2011 to help veterans, transitioning service members, and military spouses find meaningful employment opportunities. *See* About Hiring Our Heroes, https://www.hiringourheroes.org/about-hiring-our-heroes/ (last visited July 31, 2018). To date, more than 31,000 veterans and military spouses have obtained employment opportunities through Hiring Our Heroes events. And more than 505,000 veterans and military spouses have been hired by more than 2,000 companies as part of the "Hiring 500,000 Heroes" campaign. *Id.* Given its commitment to supporting veterans, the Chamber has an interest in ensuring that veterans like Petitioner do not have their rights abridged by vacillating agency interpretations of regulations.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The canonical formulation of *Auer* deference is that [the Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part, dissenting in part). The Court "offered no justification whatever" when it adopted this interpretive rule. *Id.* And in recent years, several justices have expressed interest in reconsidering the rule because it involves an improper delegation of authority, creates incentives for agencies to adopt vague regulations, and disrupts reasonable

expectations of regulated parties.[2] This case presents the opportunity for the Court to revisit *Seminole Rock* and *Auer*. It should grant the petition and overrule those decisions.

I. The business community generally benefits from laws that are clearly written and consistently applied. When agencies adopt regulations through notice-and-comment rulemaking, businesses are given an opportunity to shape the regulatory landscape in which they operate. When the notice-and-comment rulemaking process functions properly, regulated companies receive fair notice of what conduct is required or prohibited and are able to order their operations accordingly.

Auer deference harms the business community by encouraging agencies to adopt vague regulations that they can later interpret however they see fit. This practice upsets the expectations of regulated parties without the notice provided through formal rulemaking. When agencies adopt vague regulations, businesses must attempt to predict how the agency will interpret those regulations and also how likely the agency is to change that interpretation in the future. Businesses also have a more difficult time tracking an agency's shifting interpretations. Regulated companies cannot learn of changes to their regulatory obligations simply by reading the Federal Register

---

[2] *See Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment).

because the agency is just as likely to change its interpretation of a vague regulation by, for example, filing an *amicus* brief.

II. This Court should grant certiorari and overrule *Seminole Rock* and *Auer*. These decisions conflict with the Administrative Procedure Act ("APA"), violate separation-of-powers principles, and are unsupported by policy considerations. *Auer* deference conflicts with the plain language of Section 706 of the APA, which requires "the *reviewing court* [to] ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added). *Auer* deference violates separation-of-powers principles because interpreting ambiguous laws is a judicial function that courts must perform. Courts cannot delegate this authority to executive agencies. Policy considerations do not support continued adherence to *Seminole Rock* and *Auer* either. The Court has previously justified *Auer* deference based on agencies' expertise in determining the intent of ambiguous agency regulations. But an agency's policy preferences, which are always subject to change, should play no role in the purely interpretive task of deciding what an existing law means.

III. This case is an excellent vehicle for the Court to reconsider *Seminole Rock* and *Auer*. The Federal Circuit's decision turned on application of *Auer* and contained no alternative ground for its holding. Thus, the petition squarely and cleanly presents the question whether *Seminole Rock* and *Auer* should be overruled.

ARGUMENT

I. *Auer* Deference Harms The Business Community By Increasing Regulatory Uncertainty.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To ensure that federal regulations comply with this fundamental principle, the APA generally requires agencies to engage in notice-and-comment rulemaking before issuing substantive, binding regulations. *See* 5 U.S.C. § 553(b); 38 U.S.C. § 501(d) ("The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants or benefits under a law administered by the Secretary."). Notice-and-comment rulemaking is grounded in "notions of fairness" because it promotes "informed administrative decisionmaking" by allowing an agency to enact regulations "only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Notice-and-comment rulemaking provides businesses with an important opportunity to help shape the administrative decisions that govern their industries. Every decision that a business makes—from hiring employees and opening new facilities to marketing and selling its products—requires an assessment of the legal implications of that decision. When notice-and-comment rulemaking is used, businesses have the opportunity to present evidence to support regulations that make sense for their industries. And

even when a regulated company's views are not reflected in the final regulations, the company still benefits from having participated in the process because it gains a better understanding of the standards by which its conduct will be judged.

Seminole Rock and *Auer* undermine the important role played by notice-and-comment rulemaking. As the Court has explained, *Auer* deference encourages agencies to "promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012).

The business community is harmed by this approach to rulemaking. When agencies promulgate vague regulations that they can interpret later in a myriad of ways, companies have difficulty predicting what conduct is required or prohibited. Under *Auer*, it is not enough for a regulated entity to hire "an army of perfumed lawyers and lobbyists" to determine the fairest reading of vague regulations or to seek guidance from the agency. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). "Even if the [regulated party] somehow manage[s] to make it through this far unscathed, [it] must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Id.*

Seminole Rock and *Auer* also harm regulated companies by making it difficult to keep track of an agency's shifting views. When agencies engage in notice-and-comment rulemaking, they publish proposed rules in the Federal Register, and regulated parties

know that they must watch the Federal Register for proposed rulemakings that could affect them. But tracking an agency's interpretations of vague regulations is considerably more challenging because those interpretations could appear almost anywhere. For example, in *Auer*, the Court deferred to an agency interpretation advanced for the first time in an *amicus* brief. 519 U.S. at 461; *see also Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011). The Court also has deferred to one agency's interpretation of another agency's regulation. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–99 (1991). The *Auer* doctrine has created a world in which businesses must scour court dockets, *amicus* briefs, agency websites, letters sent to other companies, and other agencies' policies to fully understand the regulatory regime in which they operate.

In *Christopher*, the Court took an important step to limit *Seminole Rock* and *Auer* by refusing to defer to an agency's interpretation of ambiguous regulations that "impose[d] potentially massive liability ... for conduct that occurred well before that interpretation was announced." 567 U.S. at 155–56. But *Christopher* has not eliminated *Auer*'s adverse effects on businesses. Even after *Christopher*, courts continue to defer to agency interpretations that upset the reasonable expectations of regulated parties. For example, the Seventh Circuit recently deferred to a novel agency interpretation that made a loan guaranty agency liable for breach of contract. *See Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639, 650 (7th Cir. 2015); *see also id.* at 663 (Flaum, J., concurring in part and concurring in the judgment) (confirming that outcome depended on application of

Auer). The agency announced its interpretation for the first time in an *amicus* brief, and the court applied *Auer* deference even though the agency's interpretation was "at odds with the regulatory scheme [and] defie[d] ordinary English." *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari); *see also Bible*, 799 F.3d at 663 (Manion, J., concurring in part and dissenting in part) ("Applying the Department's *post hoc* rule to USA Funds is both wrong and unjust."). And the Federal Circuit recently deferred to the Army's mid-game rule change in a contractual dispute despite the "textually dubious" nature of the Army's interpretation. *Garco Constr., Inc.*, 138 S. Ct. at 1053 (Thomas, J., dissenting).

In short, *Auer* deference encourages agencies to adopt vague regulations that they can later interpret, and re-interpret, through informal interpretive guidance. This approach to rulemaking creates great uncertainty for the business community and others who benefit from clear regulations that provide fair notice of what is required or prohibited.

II. *Seminole Rock* And *Auer* Should Be Overruled.

Seminole Rock and *Auer* cannot be reconciled with the text of the APA, defy the Constitution's separation of powers, and cannot be justified by policy considerations. They should be overruled.

A. *Seminole Rock* And *Auer* Are Contrary To The APA.

The APA expressly provides that "the reviewing court shall ... determine the meaning or applicability

of the terms of an agency action." 5 U.S.C. § 706.[3] Section 706 thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring). Despite the Court's contrary holdings in *Seminole Rock* and *Auer*, the APA makes clear that it is "the responsibility of the court to decide whether the law means what the agency says it means." *Id.*

The Court has never attempted to reconcile *Auer* deference with the text of the APA or similar statutes. In *Auer*, the Court "[n]ever mention[ed] § 706's directive." *Id.* Instead, the Court simply relied on *Seminole Rock*, even though that case was decided before Congress enacted the APA. *See id.* Because *Seminole Rock* and *Auer* conflict with the APA, those decisions are not sufficiently "well reasoned" for the Court to continue following them. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

---

[3] The statutory requirement that courts, rather than agencies, interpret regulations applies equally to the VA. *See* 38 U.S.C. § 502 (providing that review of VA rules "shall be in accordance with chapter 7 of title 5"); *see also* 38 U.S.C. § 7261(a)(1) (requiring the Court of Appeals for Veterans Claims to "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary"); 38 U.S.C. § 7292(d)(1) (requiring Federal Circuit to "hold unlawful and set aside any regulation or any interpretation thereof" it finds to be "an abuse of discretion, or otherwise not in accordance with law").

B. *Seminole Rock* And *Auer* Violate Separation-Of-Powers Principles.

Even putting aside Section 706, *Seminole Rock* and *Auer* should be overruled because they violate separation-of-powers principles. By giving "controlling weight" to most agency interpretations, courts "violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."). *Auer* deference also flouts the Constitution's guarantee that cases and controversies will be decided by "neutral decisionmakers who will apply the law as it is, not as they wish it to be." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). In so doing, *Auer* deference "undermines 'the judicial "check" on the political branches' by ceding the courts' authority to independently interpret and apply legal texts." *Garco Constr., Inc.*, 138 S. Ct. at 1052 (Thomas, J., dissenting).

This case demonstrates the threat to separation-of-powers principles posed by *Seminole Rock* and *Auer*. During the adjudication of a veteran's benefit claim, the agency advanced an interpretation of its own regulation that caused Petitioner to lose approximately 23 years of retroactive benefits. *See* App. 14a-15a & n.10. The Federal Circuit deferred to the agency's interpretation despite recognizing that Petitioner had advanced a reasonable interpretation of the ambiguous term in the regulations. *See* App. 16a.

"This type of conduct 'frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government,'" *Garco Constr., Inc.*, 138 S. Ct. at 1053 (Thomas, J., dissenting), resulting in "precisely the abuse[] that the Framers sought to prevent." *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring); *see also Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (The Founders knew "that, when unchecked by independent courts exercising the job of declaring the law's meaning, executives throughout history had sought to exploit ambiguous laws as license for their own prerogative.").

C. *Seminole Rock* And *Auer* Cannot Be Justified On Policy Grounds.

Policy considerations do not support continued adherence to *Seminole Rock* and *Auer*. The Court has justified *Auer* deference based on agencies' purported expertise in divining the true intent of ambiguous regulations. *See, e.g., Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150–51 (1991). That flawed rationale cannot sustain the doctrine.

Policy expertise may be relevant to an agency's decision to adopt particular regulations, but that expertise is irrelevant to the purely interpretive task of resolving ambiguity in those regulations. *See Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring) ("The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means."). And even if the intent of the original drafter of the ambiguous regulations could be determined, that subjective intent should carry no weight. The ambiguity should instead be re-

solved by determining the best reading of the regulation based on the traditional tools of interpretation. *See id.* at 1222–23; *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 472–73 (1989) (Kennedy, J., concurring) ("[I]t does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation ...."); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) ("Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated.").

* * *

In short, *Seminole Rock* and *Auer* should be overruled.

III. This Case Is An Excellent Vehicle To Reconsider *Seminole Rock* And *Auer*.

This case provides a good opportunity for revisiting *Seminole Rock* and *Auer*. Unlike other recent cases,[4] the Federal Circuit did not suggest that it would have reached the same result without applying *Auer* deference. To the contrary, the Federal Circuit expressly stated its holding as an application of *Auer* deference. It explained that it would "defer to an

---

[4] *See, e.g., Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 453 (1st Cir. 2013) (Lynch, C.J., for an equally divided en banc court) ("We stress that *Auer* deference is not necessary to our conclusion. . . . Indeed, we would agree with the United States' interpretation even if we gave it no deference at all."); *Flytenow, Inc. v. FAA*, 808 F.3d 882, 890 (D.C. Cir. 2015), *cert. denied* 137 S. Ct. 618 (2017) ("Even without [*Auer*] deference, we have no difficulty upholding the FAA's interpretation of its regulations in this case.").

agency's interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation.'" App. 15a. It then held both that the regulation at issue was ambiguous and that the Board's interpretation did not "strike [the court] as either plainly erroneous or inconsistent with the VA's regulatory framework." App. 17a. Nothing in the opinion suggests that the court of appeals thought that the VA had adopted the best reading of the challenged regulation.

This Court has declined to reconsider *Seminole Rock* and *Auer* in recent cases where the issue was not sufficiently briefed. *See, e.g., Perez*, 135 S. Ct. at 1210–11 (Alito, J., concurring) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer*] in an appropriate case. But this is not that case."). Inadequate briefing will not be an issue here. The petition focuses primarily on the question whether *Seminole Rock* and *Auer* should be overruled, and thus the briefing will be focused on this important question "going to the heart of administrative law." *Decker*, 568 U.S. at 616 (Roberts, C.J., concurring).

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H. St. NW
Washington, DC 20062
(202) 463-5337

Mark W. Mosier
Counsel of Record
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
MMOSIER@COV.COM
(202) 662-6000

Kathryn Cahoy
COVINGTON & BURLING LLP
333 Twin Dolphin Drive
Suite 700
Redwood Shores, CA 94065
(650) 632-4700

Counsel for Amicus Curiae

August 2018

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN FARM BUREAU FEDERATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND NATIONAL MINING ASSOCIATION, SUPPORTING PETITIONER

MEGAN BERGE
JARED WIGGINTON
ADAM DEC
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

EVAN A. YOUNG
Counsel of Record
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Ste 1500
Austin, Texas 78701-4078
(512) 322-2500
evan.young@bakerbotts.com

Counsel for Amici Curiae

(additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

AMY CHAI
THOMAS J. WARD
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th St. NW
Washington DC 20005
(202) 266-8232
Counsel for Amicus Curiae
National Association of
Home Builders

AMANDA ASPATORE
KATIE SWEENEY
NATIONAL MINING
ASSOCIATION
101 Constitution Ave. NW,
Ste 500 E
Washington, D.C. 20001
(202) 463-2646
Counsel for Amicus Curiae
National Mining Associa-
tion

SCOTT YAGER
NATIONAL CATTLEMEN'S
BEEF ASSOCIATION
1275 Pennsylvania Ave., NW,
Ste 801
Washington, D.C. 20004
(202) 347-0228
Counsel for Amicus Curiae
National Cattlemen's Beef
Association

DANIELLE QUIST
AMERICAN FARM BUREAU
FEDERATION
600 Maryland Ave., SW,
Ste 1000 W
Washington, D.C. 20024
(202) 406-3618
Counsel for Amicus Curiae
American Farm Bureau
Federation

PETER C. TOLSDORF
NATIONAL ASSOCIATION OF
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10 St., NW, Ste 700
Washington, D.C. 20001
(202) 637-3133
Counsel for Amicus Curiae
the National Association of
Manufacturers

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amici Curiae*	1
Summary of Argument	5
Argument	5
I. Past Judicial Decisions Show That *Auer* Significantly Harms Businesses And Individuals	7
A. *Auer* promotes judicial abdication and can generate crippling economic consequences	8
B. *Auer* rewards agencies for promulgating ambiguous regulations	11
C. *Auer* causes unfair surprise and frustrates legitimate reliance interests	14
D. *Auer* undermines the APA	16
II. *Auer*'s Hidden Harms Are No Less Real	18
Conclusion	20

TABLE OF AUTHORITIES

Page(s)

CASES

Auer v. *Robbins*,
519 U.S. 452 (1997) ..... *passim*

Belle Co. v. *U.S. Army Corps of Eng'rs*,
761 F.3d 383 (5th Cir. 2014) 17

Bowles v. *Seminole Rock & Sand Co.*,
325 U.S. 410 (1945) 2, 6, 7, 10

Cape Hatteras Access Pres. All. v. *U.S. Dep't of Interior*,
344 F. Supp. 2d 108 (D.D.C. 2004) 9, 10

Christopher v. *SmithKline Beecham Corp.*,
567 U.S. 142 (2012) 14, 16

Clark v. *United States Dep't. of Agric.*,
537 F.3d 934 (8th Cir. 2008) 15

Decker v. *Nw. Envtl. Def. Ctr.*,
568 U.S. 597 (2013) 6, 7, 8, 10

Eisai, Inc. v. *U.S. Food & Drug Administration*,
134 F. Supp. 3d 384 (D.D.C. 2015) 9

Foster v. *Vilsack*,
820 F.3d 330 (8th Cir. 2016) 15

Foster v. *Vilsack*,
No. CIV. 13-4060-KES, 2014 WL
5512905 (D.S.D. Oct. 31, 2014) 14, 15

Garco Const., Inc. v. *Speer*,
138 S. Ct. 1052 (2018) 6

Gutierrez-Brizuela v. *Lynch*,
834 F.3d 1142 (10th Cir. 2016) 7, 8

Home Builders Ass'n of N. Cal. v. *U.S.*
Fish & Wildlife Serv.,
616 F.3d 983 (9th Cir. 2010) 10

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 8

New Hope Power Co. v. *U.S. Army Corps*
of Eng'rs,
746 F. Supp. 2d 1272 (S.D. Fla. 2010) 17

New Mexico Cattle Growers Ass'n v. *U.S.*
Fish & Wildlife Serv.,
248 F.3d 1277 (10th Cir. 2001) 11

Perez v. *Mortgage Bankers Ass'n*,
135 S. Ct. 1199 (2015) 16

Rapanos v. *United States*,
547 U.S. 715 (2006) 12, 20

Rivera v. *Peri & Sons Farms, Inc.*,
735 F.3d 892 (9th Cir. 2013) 15, 16

Rivera v. *Peri & Sons Farms, Inc.*,
No. 3:11-cv-00118-RCJ-VPC (D. Nev.
Dec. 15, 2015), EFC 182 16

Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 18

Talk Am., Inc. v. *Mich. Bell Tel. Co.*, 564 U.S. 68 (2011) 8, 11, 12

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 12

United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003) 12, 13

STATUTES

5 U.S.C. § 702 ..... *passim*

33 U.S.C § 1344(f)(1)(A) 19

REGULATORY AUTHORITIES

7 C.F.R. § 12.31(b)(2)(ii) 15

33 C.F.R. § 323.4(a)(1) 19

33 C.F.R. § 328.3(b)(2) 17

58 Fed. Reg. 45,008, 45,033-45,034 (Aug. 25, 1993) 17

70 Fed. Reg. 46,924, 46,943 (Aug. 11, 2005) 10

U.S. Army Corps of Engineers, Kohley Farm Jurisdictional Determination, ... 13

U.S. Army Corps of Engineers, Van Noble Farms Jurisdictional Determination, ... 13

U.S. Department of Labor, Field Assistance Bulletin 2009-2, Travel and Visa Expenses of H-2B Workers Under the FLSA (2009) 15

OTHER AUTHORITIES

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016) 6

The Federalist No. 47 (James Madison) 8

IN THE

Supreme Court of the United States

NO. 18-15

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS *ET AL.* SUPPORTING PETITIONER

INTEREST OF *AMICI CURIAE*

Amici Curiae are a group of unrelated business associations whose members are regularly affected by the doctrine of *Auer* deference.[1] They are the National Association of Home Builders, American Farm Bureau Federation, the National Association of Manufacturers,

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution. Amici affirm that counsel of record for all parties were timely notified of, and granted consent for, the filing of this brief.

National Cattlemen's Beef Association, and the National Mining Association.

Across the United States, the individuals and companies who form the membership of each of the *amici* find themselves regulated by multiple federal agencies. *Amici* therefore have a substantial interest in ensuring that agencies regulate only in a direct, clear, fair, and lawful manner—and that courts do not defer to agencies when deference is not due. This case presents an opportunity for this Court to reconsider whether, or to what extent, so-called "*Auer* deference" appropriately reflects the comparative responsibility of agencies and the judiciary.

Auer deference has become an increasingly common tool for agencies to alter their authority over a host of subjects, ranging from the veteran's benefits issues here to every major regulatory category. *Amici*'s members frequently have been affected when an agency reinterprets its regulations in a manner that fundamentally changes settled understandings—and does so without using the mechanisms that the Administrative Procedure Act (APA) required for enacting those regulations in the first place. While the comparatively rigorous standards of notice-and-comment rulemaking do not eliminate the risk of regulatory overreach, they do foster a meaningful check on agency power by requiring public participation and the development of an administrative record that facilitates judicial scrutiny of agency action.

But the principles of deference articulated in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and extended in *Auer* v. *Robbins*, 519 U.S. 452 (1997), provide no such assurances. Those cases have enabled—and tacitly *encouraged*—erosion of the judiciary's role in assessing executive assertions of authority. *Amici* respectfully urge the Court to grant the petition to reevaluate the legitimacy of this doctrine.

1. The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and economic interests of its members and those similarly situated.

2. The American Farm Bureau Federation (AFBF), headquartered in Washington, D.C., was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, the AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts, to give voice to its members.

3. The National Association of Manufacturers (NAM), based in Washington, D.C., is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion

to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

4. The National Cattlemen's Beef Association (NCBA), based in Centennial, Colorado, is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

5. The National Mining Association (NMA), based in Washington, D.C., is a national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral-processing machinery, equipment, and supplies; and engineering and consulting firms, financial institutions, and other firms serving the mining industry. NMA often participates in litigation raising issues of concern to the mining community.

Amici echo petitioner's arguments that the Court should grant the petition and definitively resolve the lingering doubt about *Auer*'s continuing viability by either abandoning or significantly narrowing the doctrine. The concrete examples of *Auer*'s seen and unseen harms provided below do not replace the legal analysis undertaken by petitioners and many others—they serve to illustrate why that analysis justifies action.

SUMMARY OF ARGUMENT

The Court is well acquainted with the jurisprudential arguments contesting *Auer*'s legitimacy, which alone justify further review. *Amici*, however, focus on *Auer*'s real-world consequences, which remain largely hidden from view despite deeply affecting millions of Americans.

Auer's legitimacy is more than a theoretical debate. When an agency invokes *Auer*—whether by name or not—it claims the power to interpret the words of its own regulations, regardless of prior positions or the public's prior understanding. The potential impacts of *Auer*'s continued application are significant. Judicial decisions memorialize a host of examples where casual reliance on *Auer* determines enormous stakes. But reported cases reflect only a fraction of *Auer*'s consequences, spanning criminal liability, monetary costs, civil rights, a lawful immigrant's right to remain in the United States, or, in petitioner's case, a Vietnam veteran's receipt of benefits.

Auer's reach is felt most deeply during routine interactions between the regulated community and federal agencies. Those facing an agency's questionable interpretation of an arguably ambiguous regulation know (or soon will learn) that *Auer* looms. They are quickly left with little practical choice but to capitulate. Courts reinforce that defensive posture by frequently illustrating that challenges to an agency's interpretation of its rules are almost futile. *Auer*'s greatest power lies not in judicial decisions, therefore, but in dissuading individuals and business from ever turning to the courts for relief.

The Court should grant the petition and definitively resolve the lingering doubt about *Auer*'s continuing viability by either abandoning or significantly narrowing it.

ARGUMENT

The *Auer* doctrine has long permitted federal agencies to expand the scope of their regulatory and enforcement

power with little or no notice to (much less comment from) the individuals and businesses most affected. Under this doctrine, the Court defers to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or flatly inconsistent with a regulation's text. *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013). Stated differently, an agency's interpretation of its regulation will almost always prevail, even when it is not the most obvious or most rational legal interpretation, if the agency can find any ambiguity in its original language.[2] This means that the regulated community cannot safely rely on the application of the obvious or most legally sound interpretation in making significant decisions that will affect their livelihoods.

Under *Seminole Rock*, this doctrine applied "exclusively in the price control context and only to official agency interpretations," but as *Auer* exemplifies, the Court "expanded it to many contexts and to informal interpretations." *Garco Const., Inc.* v. *Speer*, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., dissenting from denial of certiorari) (internal quotation marks and citation omitted). *Auer*'s increasing grasp has engendered substantial uncertainty and unfairness, despite having a questionable doctrinal foundation. Members of this Court, like judges and scholars across the nation, accordingly have expressed serious doubts about *Auer*'s continuing legitimacy. *Id.* at 1053 ("By all accounts, *Seminole Rock* deference is 'on its last gasp.' Several Members of this

---

[2] A judge's threshold determination about clarity versus ambiguity—whether in a statute or a regulation—can therefore have significant consequences for individuals and businesses. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 (2016) (acknowledging in the *Chevron* context that "[the] simple threshold determination of clarity versus ambiguity may affect billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, labor laws, or the like").

Court have said that it merits reconsideration in an appropriate case.") (citations omitted); *Decker*, 568 U.S. at 615 (Roberts, C.J., joined by Alito, J., concurring) (recognizing the "serious questions about the principle set forth in [*Seminole Rock* and *Auer*]" and stating that "[i]t may be appropriate to reconsider that principle in an appropriate case").

This skepticism is well justified. As illustrated in the examples below—in many of which *amici* here participated—*Auer* is an experiment whose time has passed.

I. Past Judicial Decisions Show That *Auer* Significantly Harms Businesses And Individuals

Businesses and individuals routinely make decisions in the face of uncertainty flowing from market forces, third-party decisionmaking, and other variables. The *Auer* doctrine has added an additional, unjustifiable, and especially problematic layer of uncertainty to this calculus for those regulated by federal agencies. Because *Auer* not only allows those agencies to alter their prior regulatory interpretations without public notice or comment, but also to retroactively enforce novel positions, its risks are always attendant.

While retaining attorneys and filing lawsuits mitigates some risk, even hiring "an army of perfumed lawyers" cannot eliminate the potential for fluctuating regulatory interpretations or retroactive administrative adjudications that are dictated by "the shift of political winds." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). Those unable to retain counsel are left in an even more precarious state. This present reality is untenable and unfair. As aptly stated by the late Justice Scalia, the very author of *Auer* who came to see its flaws: "Enough is enough." *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part).

A. *Auer* promotes judicial abdication and can generate crippling economic consequences

The central critique of the *Auer* doctrine is its concentration of power to both make and interpret the law into a single branch of government. *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 68 (2011) (Scalia, J., concurring) ("[W]hen an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning .... It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.") (internal citations omitted); see also *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J.) (quoting The Federalist No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."). This concentration of power invades what has for over two centuries been "emphatically the province and duty of the judicial department[:] to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) ("For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean.").

By merging these powers, *Auer* can result in the imposition of serious economic harms on regulated entities, if not at an agency's whim, at least without an agency's careful or transparent analysis. And *Auer* allows for such consequences to flow not from a court's scrutiny of the text of regulations to ensure consistent application and the protection of reliance interests, but instead from the judiciary yielding to novel interpretations by the rules' own drafters

The present case is notable because the panel below was quite open about *Auer* being decisive. See Pet. App. 17a (maj. op.), 47a-48a (dissenting op.). Another case

that was comparably candid was *Eisai, Inc.* v. *U.S. Food & Drug Administration*, 134 F. Supp. 3d 384 (D.D.C. 2015). The loss of potentially hundreds of millions of dollars that would come from exclusive rights over a pharmaceutical at issue in *Eisai* turned on the court's conclusion that strong arguments were "insufficient to compel the Court to cast aside the high level of deference that *Auer*" requires, which it is "bound to follow . . . until the Supreme Court modifies the relevant standard." *Id.* at 394 n.2, 395. Because the court detected some regulatory ambiguity, *id.* at 394, it felt bound by *Auer* to disregard arguments that the court itself credited as "substantial," "not without merit," and otherwise probative, *id.* at 395-397.

As *Eisai* illustrates, *Auer* can lead courts to suspend meaningful scrutiny of agency action even when the regulated community has the better argument *and* stands to lose a great deal by virtue of the new agency "interpretation" of its own regulation. *Auer* can also lead to a related form of judicial abdication, where deference to an agency's interpretation of its regulation is essentially a foregone conclusion.

For example, in *Cape Hatteras*, a district court applied *Auer* and upheld the U.S. Fish and Wildlife Service's designation of 126 linear miles of shoreline in North Carolina as critical habitat for wintering piping plovers over challenges filed by two North Carolina counties. *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115-116 (D.D.C. 2004).[3] The coastal counties, which depended on the combined annual revenue of $386 million from tourism, sued the Service to preclude the possibility of beach closures, expensive and time-consuming consultation under the Endangered Species

[3] Piping plovers spend 10 months each year on migratory routes and wintering grounds. *Cape Hatteras*, 344 F. Supp. 2d at 115.

Act, and adverse impacts on land use and recreational and commercial uses of the designated areas. *Id.* at 116.

Plaintiffs contended that the Service's adoption of mean lower water lines and vegetation lines as boundaries violated the agency's regulations prohibiting the use of "[e]phemeral reference points" (*e.g.*, trees and sand bars) to define critical habitat for the plovers. *Id.* at 125-126. The Service argued that the lines were not ephemeral because "though they may shift over time, they will always exist." *Id.* at 126. Deeming "ephemeral" to be ambiguous, the district court invoked *Auer* and ruled in favor of the agency within the span of a single paragraph.[4]

Cases that apply *Auer* to the detriment of regulated entities are not uncommon. As Chief Justice Roberts explained, "[q]uestions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis." *Decker*, 568 U.S. at 616. This includes, of course, not just blockbuster cases, but also "smaller" ones that affect individual livelihoods. For instance, the real-world implications of agency interpretations involving critical habitat designations can be severe for cattlemen, who are forced to fence off rivers—at great personal expense and incon-

---

[4] See also *Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 991 (9th Cir. 2010). In 2002, the Service designated half a million acres in California and Oregon as a critical habitat for vernal pond crustaceans. *Id.* at 991. In designating the critical habitat for vernal pond crustaceans, the Service described the area, but vaguely stated "[a]ny such structures inadvertently left inside critical habitat boundaries are not considered part of the unit." 70 Fed. Reg. 46,924, 46,943 (Aug. 11, 2005). The designation was confusing and affected land prices within the designated area, which at first-glance would have appeared to be covered. Plaintiffs challenged the designation for being imprecise and failing to delineate a "specific area," as called for by the regulation. The Ninth Circuit deferred to the agency, citing *Auer*. *Id.* at 993.

venience—to prevent livestock from wading into critical habitats. See *New Mexico Cattle Growers Ass'n* v. *U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284 n.3 (10th Cir. 2001) ("Due to the fencing, [a rancher] has been forced to reduce the size of his herd . . . [and] the fencing limits his access to river water which causes his significant inconvenience and financial harm."). Similarly, home builders working in critical habitat are often required to set aside large percentages of their property to protect species—property that could be developed into useable home lots.

The reluctance of judges to closely scrutinize agency interpretations due to *Auer*, perhaps in fear of reversal, has led to certainty of only one kind: a determined agency can likely get away with what it wants. Indeed, cases rejecting claims of *Auer* deference are blue-moon cases at best, signaling to the regulated public that there is not much to be gained by trying.

B. *Auer* rewards agencies for promulgating ambiguous regulations

A second well-known critique of the *Auer* doctrine is that it creates perverse incentives:

> [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.

Talk Am., 564 U.S. at 69 (Scalia, J., concurring). In a prior dissent joined by Justices Ginsburg, O'Connor, and Stevens, Justice Thomas highlighted this problem with respect to regulations promulgated by the U.S. Department of Health and Human Services:

> [T]he Secretary has merely replaced statutory ambiguity with regulatory ambiguity.

> It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504, 525 (1994) (5-4) (Thomas, J., dissenting). What agency wouldn't prefer the guarantee of flexibility tomorrow that flows from studiously inserting ambiguity today?

Some agencies indeed have promulgated ambiguous regulations with the purpose of expanding their jurisdiction and with the practical effect of imposing additional costs and burdens on the individuals and businesses that they regulate. See, *e.g.*, *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring) (noting that the Federal Communications Commission "has repeatedly been rebuked in its attempts to expand the [Telecommunications Act of 1996] beyond its text, and has repeatedly sought new means to the same ends."). The U.S. Army Corps of Engineers (Corps), too, has a long history of promulgating broad and ambiguous regulations having the effect of expanding its jurisdiction when not bound by the rigors of notice-and-comment rulemaking. See *Rapanos* v. *United States*, 547 U.S. 715, 725 (2006) (plurality op.).

The Fourth Circuit, for example, relied on *Auer* to affirm a district court's remediation order requiring homeowners who violated the Clean Water Act (CWA) to fill in a ditch that they dug on their property and to restore it to pre-violation conditions. *United States* v. *Deaton*, 332 F.3d 698, 701-702 (4th Cir. 2003). The homeowners had dug the drainage ditch to obtain a sewage-disposal per-

mit for the construction of a residential subdivision, which had previously been denied precisely because of the "poorly drained" condition of the property. *Id.* at 702. The homeowners deposited excavated dirt alongside the ditch in regulated wetlands on their property. *Ibid.* The government sued the homeowners for failing to obtain a permit to discharge fill materials into "navigable waters" under Section 404(a) of the CWA. *Id.* at 704. The government claimed jurisdiction because the homeowners' wetlands drained into a roadside ditch, which it deemed to be a "tributary" over which it had control because the roadside ditch eventually flowed into the navigable waters of the Wicomico River and Chesapeake Bay. *Id.* at 708. The homeowners, on the other hand, contended that the term "tributary" in the regulation referred not to a ditch, but only to a branch of water that empties "directly into a navigable waterway." *Id.* at 710. Although the Court acknowledged that the regulation in question was ambiguous due to several possible reasonable interpretations of the word "tributary," it did not determine what the best or most rational reading of the regulation was. Instead, it held for the government simply by applying *Auer* deference. *Id.* at 711.[5]

---

[5] As a further example of how *Auer* leads to capricious outcomes, in November 2016, two Corps districts completed jurisdictional determinations related to two agricultural operations—one in New York and the other in Illinois. Although each farm has isolated waterbodies and wetlands approximately one mile from the nearest traditional navigable water, the Buffalo District found no significant nexus, and thus no jurisdiction, whereas the Chicago District found a significant nexus. See Van Noble Farms Jurisdictional Determination, available at https://www.lrb.usace.army.mil/Portals/45/docs/regulatory/JDForms/2016-11-Nov/JD-LRB-2016-01169NY.pdf?ver=2016-11-22-101257-237; Kohley Farm Jurisdictional Determination, available at https://www.lrc.usace.army.mil/Portals/36/docs/regulatory/jd/2016/LRC-2016-833jd.pdf.

Reconsideration of *Auer* would allow the Court to rectify this problem.

C. *Auer* causes unfair surprise and frustrates legitimate reliance interests

Auer also lends itself to agency practices that threaten to undermine principles of due process by causing "unfair surprise" or otherwise "seriously undermin[ing] the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (citation omitted). To be sure, this Court has recognized this problem and authorized paring back the *Auer* doctrine in certain circumstances "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question," such as when an interpretation "conflicts with a prior interpretation," or the interpretation is merely a "convenient litigating position" or a "*post hoc* rationalization ... to defend past agency action against attack." *Id.* at 155 (internal quotations marks and citations omitted). In *SmithKline*, for example, this Court refused to afford *Auer* deference to a U.S. Department of Labor (DOL) interpretation of its regulations that would "impose potentially massive liability ... for conduct that occurred well before that interpretation was announced." *Id.* at 155-156.

Despite these novel safeguards, agencies have still been able to shift interpretations and offer *post hoc* rationalizations under *Auer* to defend agency conduct to the detriment of individuals and businesses. For instance, in *Foster* v. *Vilsack*, the Eighth Circuit upheld the U.S. Department of Agriculture's (USDA's) interpretation of its regulations classifying a 0.8-acre portion of Arlen and Cindy Foster's farmland as wetland, which signif-

icantly affected the Fosters' livelihood.[6] In making the wetlands determination, the USDA examined a comparison site "in the local area" pursuant to 7 C.F.R. § 12.31(b)(2)(ii) because the Fosters had altered or removed vegetation by tilling. The agency's local comparison site was a tract of land over 30 miles away. The Fosters argued that "local area" meant adjacent or in close proximity, but the district court deferred to agency staff's *post hoc* testimony interpreting "local area" to mean anywhere within the *10,835 square-mile* major land resource area (larger than the Commonwealth of Massachusetts) in which the Fosters' farm was located. See *Foster* v. *Vilsack*, No. CIV. 13-4060-KES, 2014 WL 5512905, at *11 (D.S.D. Oct. 31, 2014). The Eighth Circuit affirmed the district court's decision. See *Foster* v. *Vilsack*, 820 F.3d 330, 332-333, 335 (8th Cir. 2016).

Similarly, in *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013), the Ninth Circuit allowed a Fair Labor Standards Act (FLSA) class action suit to proceed against an employer for conduct that had been acceptable to DOL just one year earlier. For decades, employers were not required to reimburse temporary guest workers for travel expenses until after their work was completed. In 2009, under a new administration, the Department issued contrary guidance that required employers to reimburse workers hired for the H-2B Program within the first week of work. DOL, Field Assistance Bulletin 2009-2, Travel and Visa Expenses of H-2B Workers Under the FLSA 1 (2009). When Peri & Sons, relying on well-established industry practice, failed to pay their workers within the first week, they became the subject of a class action suit.

---

[6] Persons determined to have manipulated wetlands into a "converted wetland" may be ineligible to receive farm program payments. *Clark* v. *United States Dep't. of Agric.*, 537 F.3d 934, 935 (8th Cir. 2008).

At the Ninth Circuit, DOL filed an *amicus* brief arguing that Peri & Sons was liable under the agency's new interpretation, even for expenses incurred *before* March 2009. Br. for Sec'y of Labor as *Amicus Curiae* in Supp. of Plaintiffs-Appellants, *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) (No. 11-17365), EFC 13. The Department reasoned that its new interpretation "d[id] not create retroactivity concerns" because it "simply clarifie[d] what the law has always meant . . . ." *Id.* at 25. Rather than applying an impartial interpretation of the DOL regulation, the Ninth Circuit deferred to the Department's "clarification." See *Rivera*, 735 F.3d at 899. After this Court denied Peri & Sons' petition for a writ of certiorari, the company settled the class action suit for $2.8 million. *Rivera* v. *Peri & Sons Farms, Inc.*, No. 3:11-cv-00118-RCJ-VPC (D. Nev. Dec. 15, 2015), EFC 182 ([Proposed] Order Granting Final Approval and Collective Action Settlement).

This Court has sought to avoid such "convenient litigating positions" and "*post hoc* rationalization[s]." *SmithKline*, 567 U.S. at 155. Yet the practice persists. Granting this petition would allow the Court to reexamine the *Auer* doctrine and abandon or further limit it to eliminate these improper practices.

D. *Auer* undermines the APA

Finally, *Auer* demonstrably offers an end-run around the APA: it allows agencies to resolve ambiguity by reinterpreting regulations instead of using the APA's notice-and-comment requirements to alter them. See *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) ("By giving [regulations] *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving

them deference allows the agency to control the extent of its notice-and-comment-free domain.").

In one case, a sugarcane grower and renewable-energy company challenged Corps guidance on Prior Converted Cropland (PCC). *New Hope Power Co.* v. *U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1284 (S.D. Fla. 2010). Joint regulations of the Corps and EPA provide that PCC will not be regulated as among the "waters of the United States" under the CWA. 33 C.F.R. § 328.3(b)(2). In the final rule promulgating the PCC regulations, the agencies specifically stated that land will retain its PCC status regardless of use, unless abandoned. 58 Fed. Reg. 45,008, 45,033-45,034 (Aug. 25, 1993). A Florida field office of the Corps, however, circulated guidance providing that shifting PCC to a non-agricultural use would immediately result in the land losing PCC status. *New Hope*, 746 F. Supp. 2d at 1284. Through that guidance, the Corps substantially expanded the scope of land and water features deemed to be "waters of the U.S.," and thereby its jurisdiction, without complying with the APA's notice-and-comment process. New Hope challenged the guidance, and a district court set aside the guidance because it constituted a substantive rule issued without following required procedures under the APA. *Ibid.*

Despite this opinion from the *New Hope* district court, the Corps continues to issue jurisdictional wetland determinations on PCC lands that are used for non-agricultural purposes, forcing landowners to accept those determinations or file suit. See, *e.g.*, *Belle Co.* v. *U.S. Army Corps of Eng'rs*, 761 F.3d 383, 397 (5th Cir. 2014) (distinguishing *New Hope* and finding the jurisdictional determination non-reviewable). In these circumstances, owners of PCC lands must either accept the Corps' jurisdictional determination or expend significant resources to litigate the same issue in a different forum.

Overcoming litigation fatigue in the face of such agency tenacity requires no small effort, and *Auer* paves the way for agencies, if they so choose, to push beyond the scope of their authorized power and insulate their actions from judicial scrutiny.

II. *AUER*'S HIDDEN HARMS ARE NO LESS REAL

The reported cases discussed above illustrate how *Auer* can unsettle expectations and shift power from the judiciary to agencies. But these harms are the tip of the iceberg and ignore the distinct harms to the regulated community imposed by *Auer*'s chilling effect. In many of the cases employing *Auer* deference, judges expressly acknowledge *Auer*'s dubious foundation, but then surrender, as they must, to this Court's precedent. See, e.g., *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

Even when a regulated entity may have a powerful argument that *Auer* should not apply, dislodging the common judicial predisposition to simply defer under *Auer* is a formidable challenge. Indeed, due to this hurdle, businesses often will not even explore the possibility of litigating whether the agency's interpretation of its own regulation is plainly erroneous. By forestalling legitimate challenges to agency action, *Auer* eliminates a crucial check on administrative overreach, eroding the APA's clear intent that anyone "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof." 5 U.S.C. § 702. It likewise erodes the judiciary's role in maintaining the separation of powers.

Amici's members are routinely subjected to an ever-

changing web of regulatory interpretations strewn throughout the Federal Register, policy directives, guidelines, memoranda of understanding, circulars, handbooks, and informal statements from agency staff. This has produced substantial uncertainty within the regulated community as agencies continue to promulgate regulations that they can interpret (or re-interpret) later. And this has forced *amici*'s members to take risks that should not be required.

For example, even though there is a statutory exemption for certain farming and ranching activities that is reflected in CWA regulations, many of *amici*'s members are forced to obtain permits under Section 404 of the CWA to discharge dredge or fill materials into waters of the U.S. while engaging in such activities or face the risk of significant legal and financial consequences.[7] Members of this Court have recognized that the burden asso-

---

[7] The statute exempts "normal" farming or ranching activities, "such as plowing . . . [or] cultivating . . . ." 33 U.S.C § 1344(f)(1)(A); 33 C.F.R. §§ 323.4(a)(1)(iii)(A) ("Cultivating means physical methods of soil treatment employed within established farming [or] ranching . . . ."); 323.4(a)(1)(iii)(D) ("Plowing means all forms of primary tillage . . . for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops."). The term "normal" is not defined, but for something to qualify as "normal" farming, silviculture and ranching activity, it must be part of an "established (i.e. on-going)" operation and cannot bring an area into a new "use." 33 C.F.R. § 323.4(a)(1)(ii).

To this day, federal regulations are unclear about what constitutes an "established (i.e. on-going)" operation and on how far back in time the operation must be "established." As a result, farmers and ranchers continue to face enforcement actions and hefty civil fines if they fail to obtain a CWA Section 404 permit. Many do not know if they are required to do so. And if the Corps decides to pursue an enforcement action, many farmers and ranchers are likely to seek quick settlements rather than resist because their economic livelihood depends on a successful grazing or growing season.

ciated with obtaining these permits "is not trivial," as the "Corps of Engineers [] exercises the discretion of an enlightened despot" and the "average applicant for an individual permit spends 788 days and $271,596 in completing the process." *Rapanos*, 547 U.S. at 721.[8]

Over the years, EPA and the Corps have interpreted what qualifies as "normal" or a "new use" not by giving a clear (if multifaceted) definition after careful analysis and public comment, but through a series of regional manuals, circulars, and—troublingly—enforcement actions. The agencies have been threatening farmers and ranchers with potentially ruinous civil and criminal penalties for plowing their own lands and switching between ranching and farming activities.

The same is true across the business world, where time-is-money and profit margins can be razor thin. Challenges are almost certainly doomed to fail, so it is hardly surprising that most entities simply opt not to fight. A perceived willingness to rigorously apply *Auer* communicates that courts are unwilling to ensure that laws are applied as written. This Court should reconsider *Auer*, direct lower courts to refuse deference when an agency seeks to exploit *its own regulations'* vagueness, and require agencies to adhere to the written law unless and until a proper and rigorous new regulation is adopted under the APA.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[8] In *Rapanos*, regulators informed the plaintiff that the wetlands he backfilled were "waters of the United States," and that his action required a permit. Twelve years of criminal and civil litigation ensued—"for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines." *Rapanos*, 547 U.S. at 721.

Respectfully submitted.

MEGAN BERGE
JARED WIGGINTON
ADAM DEC
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

EVAN A. YOUNG
Counsel of Record
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Ste 1500
Austin, TX 78701-4078
(512) 322-2500
evan.young@bakerbotts.com

Counsel for Amici Curiae

AMY CHAI
THOMAS J. WARD
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th St. NW
Washington, DC 20005
(202) 266-8232

Counsel for the National Association of Home Builders

SCOTT YAGER
NATIONAL CATTLEMEN'S BEEF ASSOCIATION
1275 Pennsylvania Ave., NW, Ste 801
Washington, D.C. 20004
(202) 347-0228

Counsel for the National Cattlemen's Beef Association

AMANDA ASPATORE
KATIE SWEENEY
NATIONAL MINING ASSOCIATION
101 Constitution Ave. NW, Ste 500 E
Washington, D.C. 20001
(202) 463-2646

Counsel for the National Mining Association

DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave., SW, Ste 1000 W
Washington, D.C. 20024
(202) 406-3618

Counsel for the American Farm Bureau Federation

PETER C. TOLSDORF
NATIONAL ASSOCIATION OF MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10 St., NW, Ste 700
Washington, D.C. 20001
(202) 637-3133

Counsel for the National Association of Manufacturers

August 1, 2018

No. 18-15

In The Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE, ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND THE BEACON CENTER OF TENNESSEE IN SUPPORT OF PETITIONER

BRADEN BOUCEK
BEACON CENTER OF TENNESSEE
P.O. Box 198646
Nashville, TN 37219

KIMBERLY S. HERMANN
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Rd., Ste. 320
Marietta, GA 30062
(770) 977-2131
khermann@southeasternlegal.org

Counsel for Amici Curiae

July 27, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. *Seminole Rock/Auer* deference provides federal agencies with a vehicle to adjudicate their own ambiguous regulations	4
II. This Court should reconsider the *Seminole Rock/Auer*-sanctioned practice of ceding judicial power to administrative agencies	6
A. *Seminole Rock/Auer* deference is inconsistent with separation of powers principles	6
B. *Seminole Rock/Auer* deference deprives Congress and the People the benefits of the APA's notice-and-comment procedures	8
C. Members of this Court have expressed doubts about *Seminole Rock/Auer* deference	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 3

Auer v. Robbins, 519 U.S. 452 (1997) ..... *passim*

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) ..... *passim*

Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) 12

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) 15

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 12

City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013) 2, 3, 5

Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013) 3, 9, 14

FCC v. Fox Television Stations, 556 U.S. 502 (2009) 8

Flytenow v. FAA, 137 S. Ct. 618 (2017) 1

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 2

Garco Construction, Inc. v. Speer, 583 U.S. ___ (2018) 1, 12

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) 14

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 7

TABLE OF AUTHORITIES – Continued

Page

Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018) 1

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 2

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) ..... *passim*

Shands Jacksonville Med. Ctr. v. Burwell, 139 F. Supp. 3d 240 (D.D.C. 2015) 10

Smiley v. Citibank, 517 U.S. 735 (1996) 12

Sturgeon v. Frost, 136 S. Ct. 1061 (2016) 1

Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50 (2011) 3, 6, 7, 14

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 10

United States v. Mead, 533 U.S. 218 (2001) 13

United States Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807 (2016) 1

Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) 1

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 8

STATUTES

5 U.S.C. §§ 551, *et seq.* ..... *passim*

5 U.S.C. §§ 553(b)-(c) 8

5 U.S.C. § 706 7

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) 5

Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" Before the Senate Comm. on the Judiciary, 114th Cong. 1 (2015) 4, 5

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 10

Karen Kerrigan & Ray Keating, *Regulation and the 'Fourth Branch of Government'* (2014) 5

NFIB Small Business Legal Center, *The Fourth Branch & Underground Regulations* (2015) 11

Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193 (1982) 8

S. Doc. No. 77-8, Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies (1941) 8, 9

The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1961) 3

INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court, including such cases as *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g.*, *Garco Construction, Inc. v. Speer*, 583 U.S. ___ (2018); *Flytenow v. FAA*, 137 S. Ct. 618 (2017); *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016); *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

The Beacon Center is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property

---

[1] *Amici curiae* notified the parties 10 days before the filing of this brief of their intent and request to file it. All parties consented to the filing of this brief in letters. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

rights and constitutional limits on government mandates are central to its goals.

This case is of particular interest to *amici* because the continued application of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), gives the executive branch opportunities to usurp both judicial and legislative powers that the Constitution does not grant it. Combining that deference with a federal agency's power to "consider . . . its policy on a continuing basis," *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), opens the door to arbitrary and capricious agency actions that will remain unchecked. This case presents the Court with an opportunity to preserve our structure of government and revisit the highly deferential standard set forth in *Seminole Rock/Auer*.

SUMMARY OF ARGUMENT

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities[,]" *id.*, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure

limited in nature. Addressing concerns that the proposed national government would usurp the People's power to govern themselves, James Madison explained: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (citation and quotation omitted).

This case involves one such example of the executive branch's overreach and disregard for our carefully crafted government structure, but there are many thousands of other examples. The government action at issue is emblematic of a systemic problem in a government that no longer imposes meaningful checks on executive action. This case provides an opportunity to address doubts raised by several members of this Court about the continued validity of *Seminole Rock/Auer*. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) (Scalia, J., concurring).

Amici maintain that any deference afforded to a federal agency must be consistent with the Constitution and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, *et seq*. Deference to an agency's interpretation of its own ambiguous regulation offends the separation of powers principles embedded in our Constitution because it enables agencies to circumvent the APA's notice-and-comment procedures. As applied here, *Seminole Rock/Auer* deference gives Veterans Affairs license to issue arbitrary and capricious interpretations of its own regulations that carry the force of law. *Amici* therefore join Petitioner in asking this Court to reconsider *Seminole Rock/Auer* deference.

ARGUMENT

I. *Seminole Rock/Auer* deference provides federal agencies with a vehicle to adjudicate their own ambiguous regulations.

There are now "over 430 departments, agencies, and sub-agencies in the federal government." *Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" Before the Senate Comm. on the Judiciary*, 114th Cong. 1 (2015) (statement of Senator Grassley) ("*Examining the Federal Regulatory System*"). As federal agencies grow in number, so does the size of the Federal Register. For example, the Federal Register grew from 4,369 pages in 1993, to 49,813 pages in 2003, to 81,883 pages

in 2012[2] – an increase of nearly 2,000% in just 19 years. And from 2013 to 2014, "the federal bureaucracy finalized over 7,000 regulations." *Examining the Federal Regulatory System*. When one compares those 7,000 regulations to the 300 statutes enacted by Congress during those same years, the growing power of the federal bureaucracy is undeniable. *Id.*

The number of official regulations tells only part of the story. As this Court is well aware, federal agencies issue, interpret, and enforce the rules that govern our lives. "[A]s a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting). The authority agencies have accumulated is startling.

Not only do agencies' exercises of legislative authority go unchecked,[3] their regulatory interpretations often receive judicial deference under *Seminole*

---

[2] Karen Kerrigan & Ray Keating, *Regulation and the 'Fourth Branch of Government,'* at 1 (2014), http://centerforregulatorysolutions.org/wp-content/uploads/2014/04/FourthBranchWhitePaper.pdf.

[3] Courts have rarely used the delegation doctrine to discipline Congress, or by extension, to rein in federal agencies. "Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315 (2000).

Rock/Auer. This deference violates the APA because it allows federal agencies to side-step notice-and-comment procedures, and ignores the Constitution because it is inconsistent with separation of powers principles. These issues grow in importance with every page added to the Federal Register.

The time has come to abandon *Seminole Rock/Auer* deference and this case provides the vehicle to do so. Several members of this Court have pointed out the flaws with affording agencies this deference, suggesting the Court revisit it. As Justice Scalia explained, jettisoning *Seminole Rock/Auer* would leave "[t]he agency . . . free to interpret its own regulations with or without notice and comment; but *courts will decide* – with no deference to the agency – whether that interpretation is correct." *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment) (emphasis added).

II. This Court should reconsider the *Seminole Rock/Auer*-sanctioned practice of ceding judicial power to administrative agencies.

A. *Seminole Rock/Auer* deference is inconsistent with separation of powers principles.

As Justice Scalia noted, *Seminole Rock/Auer* deference is "contrary to [the] fundamental principles of separation of powers." *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring). The Constitution contemplates that each branch of government will jealously guard its own prerogatives, thus protecting individual liberty. With

Seminole Rock/Auer deference, the judiciary leaves the field resulting in the removal of an indispensable check on federal agency activities.

The rise of the administrative state may have tested the limits of the Constitution's separation of powers, but it does not change the judiciary's duty to "say what the law is." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The APA therefore instructs all reviewing courts to decide "all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action . . . and set aside agency action . . . found to be . . . arbitrary, capricious, or . . . without observance of procedure required by law. . . ." 5 U.S.C. § 706.

Even so, *Seminole Rock/Auer* deference creates separation of powers issues by giving federal agencies, not the judiciary, the primary role in determining the meaning of ambiguous regulations. *See Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461-62. It is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring). Thus, *Seminole Rock/Auer* deference directly contradicts the Constitution when it hands the judicial role of interpretation to a federal agency that itself has promulgated an ambiguous regulation.

B. *Seminole Rock/Auer* deference deprives Congress and the People the benefits of the APA's notice-and-comment procedures.

Congress recognized the hazard that agencies pose to the democratic process and liberty. For over 20 years, "a succession of bills offering various remedies appeared in Congress," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 38 (1950), leading to the APA. The law was then, and is today, "a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *FCC v. Fox Television Stations*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982)).

The APA's chief procedural safeguard, Section 553, requires administrative agencies to provide "notice of proposed rule making" and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. §§ 553(b)-(c). Congress understood that if agencies were going to wield legislative power, their procedures must "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, at 102 (1941). Public

notice-and-comment is "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id.* at 103.

In notice-and-comment procedures, Congress sought to hold agency heads accountable to both Congress and the public. Congress also sought to foster predictability and stability in the administrative arena and to establish a baseline against which the courts could measure future agency action. *Seminole Rock/Auer* deference effectively exempts agencies from the APA's notice-and-comment requirements. This exemption undermines Congress' objectives and leaves agencies free to promulgate ambiguous regulations and later interpret them, all the while knowing that their interpretation will never be subject to judicial review. *See Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting in relevant part) (internal quotation marks omitted) ("Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a flexibility that will enable clarification with retroactive effect."). It leaves them free "to control the extent of [their] notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). And it provides them the opportunity "[t]o expand this domain, . . . [by] writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Id.*

Rather than help secure consent of the governed, *Seminole Rock/Auer* deference relieves an agency of

the burden of the "imprecision that it has produced." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). The burden instead falls on the regulated community. Because of *Seminole Rock/Auer*, there is no incentive for "an agency [to] give clear notice of its policies either to those who participate in the rulemaking process prescribed by the APA or to the regulated public." *Id.*; *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524-25 (1994) (Thomas, J., dissenting) (noting that *Auer* deference undermines the objective of providing regulations that are "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law").

Legal regimes are more likely to endure if aggrieved parties believe that they had an adequate opportunity to voice objections and that the disappointing result was the product of a fair fight. Popular acceptance of agency rules depends on the "legitimacy that comes with following the APA-mandated procedures for creating binding legal obligations." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 268 (D.D.C. 2015).

Agency actions that proceed without notice-and-comment, like they do here, put the regulated community at risk. If an agency advances an interpretation of its regulations that requires the regulated community to take, or refrain from taking, a particular action, that interpretation becomes de facto – if not de jure – law on the matter, regardless of the form the

interpretation takes. The regulated community must either conform to the interpretation or risk an enforcement action, administrative or judicial, based on alleged non-compliance.[4] As Justice Scalia explained:

> [I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

Perez, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

The Veterans Affairs' interpretation is but one example of how federal agencies disregard the APA when they interpret their own regulations. And the Federal Circuit's reliance on *Auer* allows agencies to continuously change their interpretation of their own regulations with the force of law. This opens the door to the type of abuse Congress sought to prevent with the APA. Until this Court demands that the executive branch abide by the APA, federal agencies will continue their unconstitutional usurpation of power.

---

[4] *See generally* NFIB Small Business Legal Center, *The Fourth Branch & Underground Regulations* (2015), http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.

C. Members of this Court have expressed doubts about *Seminole Rock/Auer* deference.

This case presents the Court with the opportunity to reconsider the continued application of *Seminole Rock/Auer* deference.[5] This is an issue that various Justices of this Court have said should be reexamined. The Court's 2015 decision in *Perez* underscores the need for clarification about what – if any – deference courts owe to an agency's interpretation of its own regulations.

Writing for the majority, Justice Sotomayor explained that rules issued through the notice-and-comment process are called "legislative rules" because they have the "force and effect of law." *Perez*, 135 S. Ct. at 1203-04 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)). The plain implication is that rules pronounced outside the notice-and-comment process are entitled to little or no deference.[6] This line of

---

[5] Unlike the Army's policy decision in *Garco Construction, Inc. v. Speer*, 583 U.S. ___ (2018), courts do not afford the Veterans Affairs' policy decisions the same "substantial deference" afforded to true military matters of policy. *See id.* (Thomas, J., dissental).

[6] This makes sense because underlying *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency . . . to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996). But, in vesting agencies with authority to fill in ambiguous gaps, Congress essentially vests agencies with a limited legislative authority – which they may exercise only through the

analysis necessarily questions the judicial practice of deferring to rules pronounced through agency letters or other guidance materials, since they are developed with no transparency, opportunity for public input, or even basic assurances that the agency has thoroughly considered policy implications and alternatives.

Justices Alito, Thomas, and Scalia were more direct – each explicitly argued that it was time to reconsider the continued viability of *Seminole Rock/Auer*. Justice Alito observed that there is "an understandable concern about the aggrandizement of the power of administrative agencies" that stems, in part, from "this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations." *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment). He continued: "I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *Id.* at 1210-11. Similarly, Justice Thomas concluded: "By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case." *Id.* at 1225 (Thomas, J., concurring in the judgment). And Justice Scalia stated that he would "restore the balance originally struck by the [Administrative Procedure Act] . . . by abandoning *Auer* and applying the Act

---

notice-and-comment process – precisely because in exercising that authority, the agency is making rules that carry the force of law. *See United States v. Mead*, 533 U.S. 218, 230 (2001) ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure. . . .").

as written." *Id.* at 1213 (Scalia, J., concurring in the judgment). *Cf. Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that the Supreme Court's decisions on agency deference "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

Even before *Perez*, Justice Scalia expressed doubts about the validity of *Auer*. In his concurring opinion in *Talk America* he noted that he had "become increasingly doubtful of [*Auer*'s] validity[.]" 564 U.S. at 68 (Scalia, J., concurring). As a result, he was "comfort[ed] to know that [he] would reach the Court's result even without *Auer*." *Id.*

In *Decker*, members of the Court openly acknowledged that, under the right circumstances, it might be time to reconsider *Seminole Rock/Auer*. In his concurring opinion, Chief Justice Roberts, joined by Justice Alito, wrote that *Seminole Rock* (and, by inference, *Auer*) raises an issue that is "a basic one going to the heart of administrative law. Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis. The bar is now aware that there is some interest in reconsidering those cases. . . . I would await a case in which the issue is properly raised and argued." 133 S. Ct. at 1339.

Even beyond express calls to reconsider *Seminole Rock/Auer*, the limitations to its applicability reveal

the Court's struggles with it. For example, in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court found application of *Auer* deference inappropriate where an agency's interpretation is "plainly erroneous or inconsistent with the regulation" or where there are grounds to believe that an interpretation "does not reflect the agency's fair and considered judgment of the matter in question." *Id.* at 2166 (internal quotation marks omitted).

The deficiencies and harms of *Seminole Rock/Auer* deference are most evident here. As Petitioner explains, the Federal Circuit accepted the Veterans Affairs' interpretation because of *Auer*, not because of any independent finding or analysis of its own about the regulation at issue. The Federal Circuit's recognition that courts review application of *Seminole Rock/Auer* de novo, makes its rubber stamping of the Board's interpretation even worse. This case also presents the classic case of agency aggrandizement of power and the abuses that result when an agency knows that all it has to do to get a court to defer to its desired regulatory interpretation is to promulgate an ambiguous regulation at the start.

Simply stated, *Seminole Rock/Auer* deference allows lower courts to "rubber stamp" potentially defective decisions. Because such blind deference contradicts our Constitution and the APA, *amici* ask this Court to reconsider its continued validity.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amici curiae* brief, this Court should grant the petition for writ of certiorari and reverse the judgment of the Federal Court.

Respectfully submitted,

BRADEN BOUCEK
BEACON CENTER
OF TENNESSEE
P.O. Box 198646
Nashville, TN 37219

KIMBERLY S. HERMANN
Counsel of Record
SOUTHEASTERN LEGAL
FOUNDATION
2255 Sewell Mill Rd., Ste. 320
Marietta, GA 30062
(770) 977-2131
khermann@
southeasternlegal.org

Counsel for Amici Curiae

July 27, 2018

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE,
Acting Secretary of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

AMICUS BRIEF OF THE STATES OF UTAH, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, NEBRASKA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
STANFORD E. PURSER
Deputy Solicitor General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov

**Counsel of Record*
Counsel for Amicus Curiae State of Utah

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Auer v. Robbins, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Separately, in *Brown v. Gardner*, 513 U.S. 115, 118 (1994), the Court held that "interpretive doubt is to be resolved in the veteran's favor."

Petitioner, a Marine veteran, seeks disability benefits for his service-related post-traumatic stress disorder (PTSD). While the Department of Veterans Affairs (VA) agrees that petitioner suffers from service-related PTSD, it has refused to award him retroactive benefits. The VA's decision turns on the meaning of the term "relevant" as used in 38 C.F.R. § 3.156(c)(1).

Below, the Federal Circuit found that petitioner and the VA both offered reasonable constructions of that term. On that basis alone, the court held that the regulation is ambiguous, and—invoking *Auer*—deferred to the VA's interpretation of its own ambiguous regulation. The questions presented are:

1. Whether the Court should overrule *Auer* and *Seminole Rock*.

2. Alternatively, whether *Auer* deference should yield to a substantive canon of construction.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Whether *Seminole Rock* Deference Remains Valid Is Critically Important To The States. 4

A. *Seminole Rock*'s Faults Are Well Known. 4

B. Whether *Seminole Rock* Deference Remains Valid Warrants Review Because Of The Special Problems It Creates For States. 6

II. *Seminole Rock* Should Be Overruled. 15

A. *Seminole Rock* Was Wrongly Decided. .. 15

B. *Stare Decisis* Considerations Do Not Save *Seminole Rock*. 17

III. This Is An Excellent Vehicle For Reconsidering *Seminole Rock*. 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 13

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

B & B Hardware, Inc. v. Hargis Indus., Inc.,
135 S. Ct. 1293 (2015) 9

Bennett v. Ky. Dep't of Educ.,
470 U.S. 656 (1985) 14

Bible v. United Student Aid Funds, Inc.,
807 F.3d 839 (7th Cir. 2015) 5

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Brown v. Gardner,
513 U.S. 115 (1994) i

Chae v. SLM Corp.,
593 F.3d 936 (9th Cir. 2010) 8

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 15

City of Arlington v. FCC,
133 S. Ct. 1863 (2013) 7

City of New York v. FCC,
486 U.S. 57 (1988) 7

Clinton v. City of New York,
524 U.S. 417 (1998) 7

Cnty. of Santa Clara v. Trump,
250 F. Supp. 3d (N.D. Cal. 2017) 14

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) ..... *passim*

Egan v. Del. River Port Auth.,
851 F.3d 263 (3d Cir. 2017) 5

Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.,
718 F.3d 488 (5th Cir. 2013) 5

Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO,
676 F.3d 566 (7th Cir. 2012) 5

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 15

FCC v. Fox Television Stations, Inc.,
567 U.S. 239 (2012) 4, 15

G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.,
822 F.3d 709 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017) 14

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 9, 17

Garco Constr., Inc. v. Speer,
138 S. Ct. 1052 (2018) 5

Gregory v. Ashcroft,
501 U.S. 452 (1991) 16

Grier v. Am. Honda Motor Co.,
529 U.S. 861 (2000) 8, 10

Johnson v. McDonald,
762 F.3d 1362 (Fed. Cir. 2014) 5

Louisiana Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 7

Medellin v. Texas,
552 U.S. 491 (2008) 8

Montejo v. Louisiana,
556 U.S. 778 (2009) 18

PLIVA, Inc. v. Mensing,
564 U.S. 604 (2011) 8

Pearson v. Callahan,
555 U.S. 223 (2009) 18

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1984) 13, 14, 16

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015) 5, 12, 15, 19

Rosa H. v. San Elizario Indep. Sch. Dist.,
106 F.3d 648 (5th Cir. 1997) 14

Smiley v. Citibank (South Dakota), N.A.,
517 U.S. 735 (1996) 8

Sossamon v. Texas,
563 U.S. 277 (2011) 14

State Farm Bank, F.S.B. v. Burke,
445 F. Supp. 2d 207 (D. Conn. 2006) 8

Tafflin v. Levitt,
493 U.S. 455 (1990) 6, 19

Talk Am., Inc. v. Mich. Bell Tele. Co.,
564 U.S. 50 (2011) 5, 16, 18, 19

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 12

United States v. Mead Corp.,
533 U.S. 218 (2001) 7

Wells Fargo Bank of Tex. N.A. v. James,
321 F.3d 488 (5th Cir. 2003) 8

Yates v. United States,
135 S. Ct. 1074 (2015) 17

CONSTITUTION

U.S. Const. amend. XVII 10

U.S. Const. amend. XII 13

U.S. Const. art. I, § 7, cl. 2 ..... 7, 8

U.S. Const. art. II, § 1, cl. 1 9

U.S. Const. art. II, § 2, cl. 2 10

U.S. Const. art. VI, § 2 7

STATUTES AND REGULATIONS

5 U.S.C. § 553 ..... 11, 15

38 C.F.R. § 3.156(c)(1) i

RULES

S. Ct. R. 10(c) 19

OTHER AUTHORITIES

The Federalist No. 17 (J. Cooke ed. 1961) 2

The Federalist No. 46 (Madison) (J. Cooke ed., 1961) 9, 10

The Federalist No. 47 (Madison) (J. Cooke ed. 1961) 16

Philip Hamburger, *Is Administrative Law Unlawful?* (2014) 5

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 5, 11, 12

Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737 (2004) 11

Jennifer Nou, *Regulatory Textualism*, 65 Duke L.J. 81 (2015) 6

Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 Va. L. Rev. 953 (2014) 11

Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954) ... 10

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the States of Utah, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming. As sovereigns, *amici* have a pronounced interest in cases that implicate the constitutional tenets of federalism and the separation of powers.

This case fits that bill. The interpretive rule from *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), reiterated in *Auer v. Robbins*, 519 U.S. 452 (1997), uniquely harms the States. That rule requires courts to give controlling weight to a federal agency's *ad hoc* views of an ambiguous regulation—even when those views will preempt contrary State law, or retroactively change the conditions of Spending Clause legislation. *Seminole Rock* deference thus alters the balance of federal-state power and raises serious constitutional questions.

Amici urge this Court to grant certiorari and assess *Seminole Rock*'s continuing validity. Careful scrutiny will confirm that, for *Seminole Rock*'s rule, "[e]nough is enough." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part).

---

[1] Counsel of record for all parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

To allay fears about the proposed Constitution, Alexander Hamilton assured the people of New York that "[i]t will always be far more easy for the State governments to encroach upon the national authorities, than for the national government to encroach upon the State authorities." The Federalist No. 17, at 106 (J. Cooke ed. 1961). *Seminole Rock* and *Auer* have made Hamilton a liar.

Those two cases, which *amici* refer to synonymously, give federal agencies a judicially created power to bind the States to *ad hoc* interpretations of their agency's own ambiguous regulations. "The canonical formulation of *Auer* deference is that [this Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (quoting *Seminole Rock*, 325 U.S. at 414).

Lately, however, the more canonical statements about *Seminole Rock* have been criticisms of it. Rightly so. Time and experience have laid bare *Seminole Rock*'s faults. *Seminole Rock* allows agencies to bind the public to informal rules adopted without following the Administrative Procedure Act's (APA) strictures. That is bad for the public; they become governed by agency caprice, with no prior notice of an agency's views (or a chance to help shape them). In contrast, it's hard to think of a better deal for regulators, who can accomplish their goals free from the hassle of complying with the APA.

Fixing those problems is reason enough to grant certiorari and reverse the decision below. But there is more. *Seminole Rock* deference creates unique problems for States that also justify plenary review. *Seminole Rock* upsets the Constitution's finely wrought balance of federal-state power: By giving controlling weight to informal agency action that conflicts with contrary State law, *Seminole Rock* effectively expands the Federal government's power under the Supremacy Clause, deprives States of constitutional safeguards from Federal overreach, and undermines the States' APA protections. *Seminole Rock* also allows agencies to retroactively change the terms of federal-state agreements in Spending Clause legislation. That threatens the States with the loss of vast sums—even hundreds of millions of dollars—just because of one federal bureaucrat's change of mind.

Those problems call not only for revisiting *Seminole Rock* deference but also for overruling it. No *stare decisis* considerations support retaining it. And this case is an excellent vehicle for doing so—the issue is squarely and properly presented. The Court should grant certiorari and reverse the judgment below.

ARGUMENT

I. Whether *Seminole Rock* Deference Remains Valid Is Critically Important To The States.

A special mischief arises when an agency authoritatively interprets its own ambiguous regulations. That mischief affects the public writ large but harms the States uniquely because they are sovereigns subject to federal bureaucratic edicts. *Seminole Rock*'s impact on the States justifies plenary review.

A. *Seminole Rock*'s Faults Are Well Known.

Seminole Rock's flaws are not secrets. First, *Seminole Rock* deference gives an agency's informal, *ad hoc* interpretation of its regulations the same force of law as rules the agency promulgates through formal notice-and-comment rulemaking. This creates a problematic but obvious incentive for agencies: take the shortcut. Adopt vague formal rules, then return to them later—when you're not hamstrung by the APA's formalities—to get the result you really want. Second, those shortcuts by definition deprive the public of "fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Third, *Seminole Rock* makes agencies *sui generis* among the federal branches: They become both lawmaker and judge, wielding power to adopt (ambiguous) regulations *and* to effectively have the last word on what those (ambiguous) regulations mean. The petition ably explains those faults. *See* Pet. 10-18.

Members of this Court have previously identified these problems.[2] So have other federal judges[3] and academics.[4]

---

[2] *See, e.g.*, *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from the denial of certiorari); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211-13 (Scalia, J., concurring in the judgment); *id.* at 1213-25 (Thomas, J., concurring in the judgment); *Decker*, 568 U.S. at 616-26 (Scalia, J., concurring in part and dissenting in part); *Talk Am., Inc. v. Mich. Bell Tele. Co.*, 564 U.S. 50, 67-69 (2011) (Scalia, J., concurring).

[3] *See, e.g.*, *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) ("The problems [*Auer* and *Seminole Rock*] create are serious and ought to be fixed."); *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841-42 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc) (explaining the consequence of applying *Auer* deference in that case: the party's "conduct, in compliance with agency advice when undertaken (and consistent with the district judge's view of the regulations' text), is now a federal felony and the basis of severe penalties in light of the Department's revised interpretation announced while the case was on appeal"); *Johnson v. McDonald*, 762 F.3d 1362, 1368 (Fed. Cir. 2014) (O'Malley, J., concurring) ("the validity of *Auer* deference is questionable"); *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488, 494 (5th Cir. 2013) ("Affording deference to agency interpretations of ever more ambiguous regulations would allow the agency to function not only as judge, jury, and executioner but to do so while crafting new rules."); *Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 576 n.5 (7th Cir. 2012) (explaining that *Auer* "raises serious separation-of-powers and administrative law concerns").

[4] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996); *see also, e.g.*, Philip Hamburger, *Is Administrative Law Unlawful?* 317 & n.25 (2014) (arguing that a court's deferring

Amici also agree with those critiques but will not belabor them. Instead, *amici* highlight *Seminole Rock*'s uniquely problematic impacts on States—entities that "possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause," *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), but that remain subject to federal regulatory *diktats*.

B. Whether *Seminole Rock* Deference Remains Valid Warrants Review Because Of The Special Problems It Creates For States.

Seminole Rock deference imposes at least four hardships distinctively on States. First, it expands the Federal government's power to preempt State law. Second, it undermines the States' political protections built into the Constitution. Third, it undercuts the States' APA protections, which decreases the States' political checks on federal lawmaking and upsets the balance of federal-state power. Fourth, it allows agencies to retroactively change conditions governing the States' receipt of federal funds from Spending Clause legislation—something not even Congress can do.

---

to an agency's interpretation of its own regulations amounts to an "abandonment of judicial office," particularly since "the Court would not defer to an act of Congress interpreting a prior act" of Congress); Jennifer Nou, *Regulatory Textualism*, 65 Duke L.J. 81, 90-91 (2015) (explaining the "sense" of various academics and Supreme Court Justices "that an unreflective rule of deference has facilitated tenuous agency interpretations at the expense of fair notice and process").

1. State laws that conflict with valid federal laws are unenforceable. U.S. Const. art. VI, § 2. States thus have an interest in ensuring that federal law arises from constitutionally prescribed procedures. *Seminole Rock* deference impairs the States' ability to vindicate that interest.

Federal legislation becomes law after both houses of Congress approve it and the President signs it (or Congress overrides a veto). U.S. Const. art. I, § 7, cl. 2; *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). The bicameralism and presentment requirements reflect the Framers' decision that Federal legislative power should "be exercised in accord with a single, finely wrought and exhaustively considered procedure." *Id.* at 419. That sole procedure is the only legislative mechanism that the ratifying States agreed would produce "the supreme law of the land," U.S. Const. art. VI, § 2, capable of displacing conflicting state law.

Even so, this Court has held that state laws may be preempted not only by duly enacted federal statutes, but also by "a federal agency acting within the scope of its congressionally delegated authority." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *see also, e.g.*, *City of New York v. FCC*, 486 U.S. 57, 64 (1988). Whatever that holding's vitality where Congress has expressly (or implicitly) "delegated to the agency the authority to interpret [statutory] ambiguities 'with the force of law,'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001)), that theory cannot justify a federal *agency's* interpretation of its own ambiguous regulation displacing state law. For

even if Congress implicitly authorizes an agency to resolve any ambiguities in a statute it implements, *see, e.g.*, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996), "there is surely no congressional implication that the agency can resolve ambiguities in its own regulations," *Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting). Yet that is where *Seminole Rock* inevitably leads.

And courts have in fact followed that path. They have held state law to be displaced when it purportedly conflicts with an agency's interpretation of its own ambiguous regulations. *See, e.g.*, *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 612-25 (2011); *Grier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000); *Chae v. SLM Corp.*, 593 F.3d 936, 948-50 (9th Cir. 2010); *Wells Fargo Bank of Tex. N.A. v. James*, 321 F.3d 488, 494-95 (5th Cir. 2003); *State Farm Bank, F.S.B. v. Burke*, 445 F. Supp. 2d 207, 221 (D. Conn. 2006). State law thus gets trumped by a form of federal law at least two steps removed from any law "made in pursuance" of the Constitution's text. U.S. Const. art. I, § 7, cl. 2.

That troublesome conclusion is even more puzzling given *Seminole Rock*'s incongruity with this Court's precedent about the preemptive reach of Executive action. The President cannot arrogate to himself the power to preempt state law. *Medellin v. Texas*, 552 U.S. 491, 523-32 (2008) (holding that the President cannot preempt state law absent constitutional or statutory authorization). It must follow that the President's administrative functionaries also cannot arrogate to themselves the power to preempt state law absent constitutional or statutory authorization. After all, "[e]xecutive agencies derive their authority from

Article II of the Constitution, which vests '[t]he executive power' in 'a President of the United States.'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting) (quoting U.S. Const. art. II, § 1, cl. 1). Yet *Seminole Rock* requires courts to defer to agency action that inherently lacks statutory authorization—*even when* it preempts state law. The upshot? What *Medellin* prohibits of the principal, *Seminole Rock* expressly authorizes by his agents.

In short, *Seminole Rock* deference undermines the bargain the States struck when they ratified the Supremacy Clause. This Court should grant certiorari to consider whether that deference remains appropriate.

2. *Seminole Rock* deference also undermines the Constitution's political protections for States. "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). Indeed, the very "composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Id.* at 550-51.

For example, Article I, section 7's bicameralism requirement ensures that legislation must win the approval of the Senate, "where each State received equal representation and each Senator was selected by the legislature of his State." *Garcia*, 469 U.S. at 551. More generally, the Framers believed that legislators' attachment to their individual States would make them "disinclined to invade the rights of the individual States, or the prerogatives of their governments." The

Federalist No. 46, at 319 (Madison) (J. Cooke ed., 1961).

Even though Senators are now elected by popular vote rather than by state legislature, U.S. Const. amend. XVII, States still retain their equal representation in the Senate. And because both Senators and Representatives are elected from specific States, they have real incentives to be responsive to their constituents' varying state-specific needs and interests. *Cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 547 (1954) ("To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.").

But the States lack an analogous direct constitutional role in the composition of federal agencies. To be sure, Senators exercise advice-and-consent authority when voting on the President's nominees to agency positions. U.S. Const. art. II, § 2, cl. 2. But no officials dependent on a State's political support thereafter participate in an agency's workaday activities in any way analogous to a Representative's or Senator's involvement in the House's or Senate's daily business. Agencies thus lack the same institutional incentives to respect State interests when promulgating regulations that motivate members of Congress when they enact statutes. *See Grier*, 529 U.S. at 908 (Stevens, J., dissenting) ("Unlike Congress, administrative agencies are not designed to represent the interests of States.").

Seminole Rock deference further depresses the limited agency incentives to promulgate clear rules when resolving statutory ambiguities. Under *Seminole Rock*, an agency's later, *ad hoc* views of vague regulations have the same preemptive force as formal rules. The resulting incentives favoring *informal* agency action—and the concomitant attenuation between those informal acts and statutory authority—reduce the States' chances of meaningfully influencing federal regulatory policies that directly affect their interests. *See* Manning, *Constitutional Structure*, 96 Colum. L. Rev. at 654 (explaining that *Seminole Rock* "undermine[s] the effectiveness of external political checks on administrative agencies").

This Court should grant review and determine whether *Seminole Rock* deference remains justified in light of its effect on the Constitution's political safeguards for States.

3. *Seminole Rock* also limits the States' ability to invoke statutory procedural safeguards. The APA requires agencies to promulgate substantive regulations through notice-and-comment rulemaking. *See* 5 U.S.C. § 553. When agencies comply with that requirement, States can—and do—actively participate in the notice-and-comment process to ensure that federal agencies understand their interests and views. *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 Va. L. Rev. 953, 984-95 (2014) (discussing the role of the States and state interest groups in administrative proceedings); Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 777-78 (2004) (reviewing opportunities for the States to participate in the administrative process).

Unfortunately, *Seminole Rock* distorts the APA's regulatory processes. It creates an incentive for agencies to issue ambiguous regulations that they can later interpret in less formal proceedings, free from the APA's formal constraints. Agencies thus can accomplish their regulatory goals *and* avoid the accountability contemplated by the APA's notice-and-comment requirements. *See, e.g.*, Manning, *Constitutional Structure*, 96 Colum. L. Rev. at 654 (explaining that *Seminole Rock* limits "the efficacy of rulemaking as a check upon arbitrary and discriminatory agency action"). Indeed, in light of *Seminole Rock*, "[i]t is perfectly understandable . . . for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

In short, when courts give "controlling weight" to agency interpretations of ambiguous regulations, they sanction an agency's intentional circumvention of the APA, thus "allow[ing] agencies to make binding rules unhampered by notice-and-comment procedures." *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). This deprives coordinate sovereigns of their statutory rights to influence federal regulatory actions through notice-and-comment procedures. Whether *Seminole Rock* deference remains justified given those heavy costs is a question deserving of this Court's plenary review.

4. *Seminole Rock* deference is in obvious tension with this Court's Spending Clause precedents.

Under the Spending Clause, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1984). That is because spending statutes are "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed limitations." *Id.* And Congress's power to make those contracts "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'"; that is, "[t]here . . . can be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* Thus Congress may not "surpris[e] participating States with post acceptance or 'retroactive' conditions." *Id.* at 25.

That need for clarity peaks when Congress conditions receiving federal funds on the States' agreement to relinquish their historic immunity from suit. In the Eleventh Amendment context, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). This clear-statement rule recognizes "the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst*, 465 U.S. at 99-100.

Seminole Rock's deference rule creates tension with those Spending Clause precedents in at least two ways. First, because those cases require *Congress* to speak clearly as to whether the States are bound to an obligation, there is no basis for courts to give binding deference to an *agency* when Spending Clause legislation "is susceptible of multiple plausible interpretations."

Sossamon v. Texas, 563 U.S. 277, 287 (2011). Yet *Seminole Rock* requires that course. Second, courts must defer under *Seminole Rock* no matter when the agency announces its *ad hoc* views. But the *Pennhurst* canon requires that Congress provide notice of the conditions "at t[he] time" the funds are received. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669-70 (1985). *Seminole Rock* deference may thus be the sole exception to the general rule that the federal government may not "modify past agreements with recipients by unilaterally issuing" new "guidelines" after the agreement has been consummated. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997).

Though the decision below does not arise from a dispute about Spending Clause legislation, recent executive action in that context shows why guidance on *Seminole Rock*'s continuing vitality is needed. In one instance, federal agencies changed their views about Title IX spending legislation via a letter to State education officials, threatening their contracting State partners with the loss of hundreds of millions of dollars in educational funding nationwide. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017). In another, counties challenged an executive order that they contended gave agencies the authority to deprive them of potentially billions of dollars in federal funds because they disagree with the Administration's immigration policies. *See Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 511-16 (N.D. Cal. 2017). A decision in this case could resolve the unacceptable tension between *Seminole Rock* and *Pennhurst*, with its potentially massive consequences for State coffers.

II. *Seminole Rock* Should Be Overruled.

It is time to jettison *Seminole Rock*. Experience has confirmed that *Seminole Rock*'s deference rule cannot bear its own weight. And *stare decisis* considerations do not support retaining it.

A. *Seminole Rock* Was Wrongly Decided.

Seminole Rock's deference rule consistently yields results that conflict with first principles of administrative and constitutional law.

For example, where administrative law presumes that regulations "must give fair notice of conduct that is forbidden or required," *Fox Television Stations*, 567 U.S. at 253, *Seminole Rock* deference blesses *post hoc* agency action that gives the public *no* warning—let alone "fair warning"—"of the conduct a regulation prohibits or requires," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (internal quotation marks omitted). And where the APA presumes that the public will be bound by formal rules made through notice-and-comment procedures, *see* 5 U.S.C. § 553, *Seminole Rock* deference allows an agency's informal, *ad hoc* views "not just to advise the public, but also to bind them." *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). So much for the "extensive procedural safeguards" that the States secured as part of administrative law's main "working compromise." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

Seminole Rock also produces results that conflict with the Constitution. The Founders viewed the

separation of powers as the "political truth" of "greate[st] intrinsic value." The Federalist No. 47, at 324 (Madison) (J. Cooke ed. 1961). For "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." *Id.* at 326 (internal quotation marks omitted). And were the judicial power "joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." *Id.* (internal quotation marks omitted). Yet *Seminole Rock* "permit[s] the person who promulgates a law to interpret it as well." *Talk America*, 564 U.S. at 68 (Scalia, J., concurring).

Equally problematic, *Seminole Rock* deference contradicts longstanding constitutional presumptions under the Supremacy Clause and the Spending Clause. First, the Federal government's power to preempt State law "is an extraordinary power in a federal system" that this Court "assume[s] Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *Seminole Rock*, however, upends that presumption when an agency is the lawmaker. An agency's *ad hoc* views of ambiguous regulations are the very embodiment of lawmaking "exercise[d] lightly"—yet *Seminole Rock* commands courts to credit them over contrary State law. Second, Congress must clearly state the terms it requires of States as a condition of receiving federal funds *before* the State agrees to them. *Pennhurst*, 451 U.S. at 17, 25. But *Seminole Rock* requires courts to defer to an *agency*'s after-the-fact views of those conditions—views the assenting States never could have known. Neither result is constitutionally sound; there is no justifiable basis for

allowing courts to grant more slack to agencies who mount *ad hoc* attacks on State law, or revise the States' contracting conditions, than they grant to Congress.

Seminole Rock also incentivizes the creation of federal lawmaking via informal agency action. If more law is made that way—rather than in Congress or by formal regulatory proceedings—the States continue to lose the benefits of the Constitution's structural protections "designed in large part to protect the States from overreaching by Congress," *Garcia*, 469 U.S. at 550-51, and of their APA right to advocate their interests in notice-and-comment proceedings.

Those myriad problems should be fatal to *Seminole Rock*'s deference rule. A hypothetical example about the canons of *ejusdem generis* and *noscitur a sociis* makes the point. If interpreting a text's ambiguous, general term in light of that text's more specific related or associated terms, *see Yates v. United States*, 135 S. Ct. 1074, 1085-87 (2015), consistently led to outcomes that flouted bedrock principles of constitutional and administrative law, not another year would pass before this Court would purge those canons from the United States Reports. The same fate is appropriate for *Seminole Rock* deference—a rule used to interpret an agency's informal views of ambiguous regulatory text.

B. *Stare Decisis* Considerations Do Not Save *Seminole Rock*.

As the petition explains, this Court may not even need to consider traditional *stare decisis* principles before jettisoning *Seminole Rock* deference because *Seminole Rock* "is merely an interpretive tool." Pet. 18 (citing *Mortgage Bankers*, 135 S. Ct. at 1214 n.1

(Thomas, J., concurring in the judgment)). In any event, assuming *stare decisis* applies, not one of its factors supports retaining *Seminole Rock* deference.

Far from being "well reasoned," *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009), *Seminole Rock*'s deference rule rests solely on "*ipse dixit*," with "no justification whatsoever," *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part). *Auer* did not fill that gap; it rotely applied *Seminole Rock*. *See* 519 U.S. at 461. Nor have this Court's cases since *Seminole Rock* "put forward a persuasive justification for *Auer* deference." *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part).

Compounding that problem, the intervening years have created "a considerable body of new experience to consider regarding the consequences of requiring adherence to" an agency's *ad hoc* views, *Pearson v. Callahan*, 555 U.S. 223, 234 (2009)—and none of it bodes well, *see supra* at 6-18. So events since *Seminole Rock*'s inception only confirm why it should be abandoned.

Nor can the "reliance interests at stake," *Montejo*, 556 U.S. at 793, save *Seminole Rock*'s deference rule. That rule benefits only federal agencies. They are thus the parties naturally expected to claim an interest in preserving it. But the Court should rightfully question the federal government's attempt to preserve its ability "to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk America*, 564 U.S. at 69 (Scalia, J., concurring). Those are not the type of reliance interests sufficient to justify retaining an interpretive rule that so plainly "frustrates the

notice and predictability purposes of rulemaking, and promotes arbitrary government." *Id.*

III. This Is An Excellent Vehicle For Reconsidering *Seminole Rock*.

Members of this Court have awaited "an appropriate case," *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring), "in which the validity of *Seminole Rock* may be explored through full briefing and argument," *Mortgage Bankers*, 135 S. Ct. at 1210-11 (Alito, J., concurring in part and concurring in the judgment). This is that case.

Whether *Seminole Rock* remains valid is squarely presented here. The Federal Circuit's holding rests on *Seminole Rock* deference. Pet. App. 15a (invoking *Seminole Rock* and *Auer*); *id.* at 17a (holding "that the [Respondent's] interpretation [of the disability-benefits regulation] does not strike us as either plainly erroneous or inconsistent with the VA's regulatory framework"). And the Federal Circuit might have reached a different conclusion but for *Seminole Rock*'s requirements. *See id.* ("Both parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable.").

The question presented also has been "properly raised and argued." *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring). The Petition exhaustively explains why *Seminole Rock*'s continuing validity merits plenary review. The unique harms to States explained above provide additional reasons from "concurrent" sovereigns, *Tafflin*, 493 U.S. at 458, to grant certiorari and review this "important question of federal law," S. Ct. R. 10(c).

CONCLUSION

The Court should grant the petition and overrule *Seminole Rock* and *Auer*.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
STANFORD E. PURSER
Deputy Solicitor General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov

**Counsel of Record*
Counsel for Amicus Curiae State of Utah

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
STATE OF ALABAMA

MARK BRNOVICH
Attorney General
STATE OF ARIZONA

LESLIE RUTLEDGE
Attorney General
STATE OF ARKANSAS

CHRISTOPHER M. CARR
Attorney General
STATE OF GEORGIA

LAWRENCE G. WASDEN
Attorney General
STATE OF IDAHO

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA

DEREK SCHMIDT
Attorney General
STATE OF KANSAS

JEFF LANDRY
Attorney General
STATE OF LOUISIANA

BILL SCHUETTE
Attorney General
STATE OF MICHIGAN

DOUG PETERSON
Attorney General
STATE OF NEBRASKA

ADAM PAUL LAXALT
Attorney General
STATE OF NEVADA

MICHAEL DEWINE
Attorney General
STATE OF OHIO

MIKE HUNTER
Attorney General
STATE OF OKLAHOMA

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA

KEN PAXTON
Attorney General
STATE OF TEXAS

PATRICK MORRISEY
Attorney General
STATE OF WEST
VIRGINIA

BRAD SCHIMEL
Attorney General
STATE OF WISCONSIN

PETER K. MICHAEL
Attorney General
STATE OF WYOMING

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

JOINT APPENDIX

PAUL W. HUGHES
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Counsel for Petitioner

NOEL J. FRANCISCO
Counsel of Record
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@USDOJ.gov

Counsel for Respondent

Petition for Writ of Certiorari Filed June 29, 2018
Certiorari Granted December 10, 2018

TABLE OF CONTENTS

Relevant Docket Entries 1

Veteran's Application for Compensation or Pension (Dec. 3, 1982) 6

Psychiatric Examination and Post-Traumatic Stress Review (Mar. 2, 1983) 10

Addendum to Psychiatric Examination and Post-Traumatic Stress Review (Mar. 16, 1983) 13

Veterans Administration Rating Decision (May 9, 1983) 15

Application for Service-Connected Compensation for Post-Traumatic Stress Disorder (June 5, 2006) 16

Department of Veterans Affairs Memorandum (June 22, 2007) 21

Submission of New and Material Evidence to the Department of Veterans Affairs (Aug. 24, 2007) 23

Department of Veterans Affairs Rating Decision (Sept. 18, 2007) 41

Notice of Disagreement and Request for De Novo Decision Review Officer Review (Nov. 30, 2007) 45

Department of Veterans Affairs Decision Review Officer Decision (Mar. 25, 2009) 50

Department of Veterans Affairs Statement of the Case (Jan. 14, 2010) 56

Relevant Docket Entries

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JAMES L. KISOR,
Appellant,
v.
DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,
Appellee.

No. 14-2811

DATE	DESCRIPTION
08/26/2014	Notice of Appeal.
	* * *
08/27/2014	Declaration of Financial Harship.
	* * *
09/24/2014	Copy of BVA Decision.
	* * *
10/27/2014	Record Before the Agency notice.
	* * *
02/24/2015	Conference held.
	* * *
05/07/2015	Appellant's Brief.
	* * *
08/18/2015	Appellee's Brief.
	* * *

DATE	DESCRIPTION
10/02/2015	Appellant's reply brief.
10/15/2015	Record of Proceedings.
10/30/2015	Assigned case to Judge Lance.
01/27/2016	Memorandum Decision that the BVA decision is affirmed.
02/18/2016	Judgment.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant – Appellant,

v.

DAVID J. SHULKIN,
Secretary of Veterans Affairs,
Respondent – Appellee.

No. 16-1929

NO.	DATE	DESCRIPTION
1	04/27/2016	Appeal docketed.
		* * *
5	05/26/2016	Docketing Statement for the Appellant James L. Kisor.
6	05/27/2016	Docketing Statement for the Appellee McDonald.
		* * *
12	08/05/2016	BRIEF FILED for Appellant James L. Kisor.
		* * *
21	11/29/2016	BRIEF FILED for Appellee McDonald.
		* * *
27	01/26/2017	Official caption revised to reflect the change is Secretary of Veterans Affairs.

NO.	DATE	DESCRIPTION
28	01/25/2017	REPLY BRIEF FILED for Appellant James L. Kisor.
29	01/25/2017	APPENDIX FILED for James L. Kisor.
		* * *
33	02/16/2017	Official caption revised to reflect change in department secretary.
		* * *
38	06/06/2017	Submitted after ORAL ARGUMENT.
39	06/08/2017	Citation of Supplemental Authority pursuant to Fed. R. App. P. 28(j) for Appellant James L. Kisor.
40	09/07/2017	OPINION and JUDGMENT filed.
41	10/23/2017	Petition for panel rehearing, for en banc rehearing filed by Appellant James L. Kisor.
		* * *
43	11/02/2017	The court invites a response from Appellee Shulkin to the petition for panel rehearing filed by Appellant in 16-1929, petition for en banc rehearing filed by Appellant in 16-1929.
44	11/16/2017	RESPONSE of Appellee Shulkin to the petition for panel rehearing [41] filed by Appellant

NO.	DATE	DESCRIPTION
		James L. Kisor in 16-1929 , petition for en banc rehearing [41] filed by Appellant James L. Kisor in 16-1929.
		* * *
47	01/31/2018	PRECEDENTIAL ORDER filed denying [41] petition for panel rehearing filed by James L. Kisor; denying [41] petition for en banc rehearing filed by James L. Kisor.
48	02/07/2018	Mandate issued to the United States Court of Appeals for Veterans Claims.
		* * *

Veterans Administration

VETERAN'S APPLICATION FOR COMPENSATION OR PENSION

FORM APPROVED (OMB NO. 2900-0001)

JAN 11 1983

IMPORTANT: Read attached General and Specific Instructions before completing this form. Type, print or write plainly.

(DO NOT WRITE IN THIS SPACE) VA DATE STAMP

DEC 1982 PORTLAND, OREGON VARO

1A. FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN: JAMES L. KISOR

1B. TELEPHONE NO. (Incl. Area Code)

2. MAILING ADDRESS OF VETERAN (Number and street or rural route, city or P.O., State and ZIP code)

3A. VETERAN'S SOC. SECURITY NO.

3B. SPOUSE'S SOC. SECURITY NO.

4. DATE OF BIRTH: [illegible]

5. PLACE OF BIRTH: Portland, OR

6. SEX: M

7. RAILROAD RETIREMENT NO.

8. HAVE YOU EVER FILED A CLAIM FOR COMPENSATION FROM THE OFFICE OF WORKERS' COMPENSATION PROGRAMS? (Formerly the U.S. Bureau of Employees' Compensation)
☐ YES ☑ NO

8A. VA FILE NUMBER: C-

8B. HAVE YOU PREVIOUSLY FILED A CLAIM FOR ANY BENEFIT WITH THE VETERANS ADMINISTRATION?
☐ NONE
☐ HOSPITALIZATION OR MEDICAL CARE
☐ WAIVER OF RETIREMENT PREMIUMS
☐ DISABILITY COMPENSATION OR PENSION
☐ VOCATIONAL REHABILITATION (Chapter 31)
☒ VETERANS EDUCATIONAL ASSISTANCE (Chapter 33 or 34)
☐ WAR ORPHANS OR DEPENDENTS EDUCATIONAL ASSIST. (Chap. 35)
☐ DENTAL OR OUTPATIENT TREATMENT
☐ OTHER (Specify)

8C. VA OFFICE HAVING YOUR RECORDS (If known): RPC 376

SERVICE INFORMATION

NOTE: Enter complete information for each period of active duty including Reservist or National Guard Status. Attach Form DD 214 or other separation papers for all periods of active duty to expedite processing of your claim. If you do NOT have your DD 214 or other separation papers check (√) here ☐

10A. ENTERED ACTIVE SERVICE: DATE	PLACE	10B. SERVICE NO.	10C. SEPARATED FROM ACTIVE SERVICE: DATE	PLACE	10D. GRADE, RANK OR RATING, ORGANIZATION OR BRANCH OF SERVICE
11/6/62	Portland, OR		11/4/66	Camp Lejeune N.C.	PFC, USMC.

10E. HAVE YOU EVER BEEN A PRISONER OF WAR? ☐ YES ☒ NO (If "Yes," complete Items 10F and 10G)

10F. NAME OF COUNTRY

10G. DATES OF CONFINEMENT

11. IF YOU SERVED UNDER ANOTHER NAME, GIVE NAME AND PERIOD DURING WHICH YOU SERVED AND SERVICE NO.

12. IF RESERVIST OR NATIONAL GUARDSMAN, GIVE BRANCH OF SERVICE AND PERIOD OF ACTIVE OR INACTIVE TRAINING DUTY DURING WHICH DISABILITY OCCURRED

13A. IF YOU ARE NOW A MEMBER OF THE RESERVE FORCES OR NATIONAL GUARD GIVE THE BRANCH OF SERVICE

13B. RESERVE STATUS ☐ ACTIVE ☐ INACTIVE ☐ RESERVE OBLIGATION

13C. RESERVE OR NATIONAL GUARD UNIT ADDRESS

14A. ARE YOU NOW RECEIVING OR WILL YOU RECEIVE RETIREMENT OR RETAINER PAY FROM THE ARMED FORCES? ☐ YES ☒ NO (If "Yes," complete Items 14B, 14C, and 14D)

14B. BRANCH OF SERVICE

14C. MONTHLY AMOUNT: $

14D. RETIRED STATUS ☐ PERMANENT ☐ TEMPORARY DISABILITY RETIRED LIST

15A. HAVE YOU EVER APPLIED FOR OR RECEIVED DISABILITY SEVERANCE PAY FROM THE ARMED FORCES? ☐ YES ☒ NO (If "Yes," complete Item 15B)

15B. AMOUNT: $

16A. HAVE YOU RECEIVED LUMP SUM READJUSTMENT PAY FROM THE ARMED FORCES? ☐ YES ☒ NO (If "Yes," complete Item 16B)

16B. AMOUNT: $

MARITAL AND DEPENDENCY INFORMATION

17A. MARITAL STATUS (Check one): ☒ MARRIED ☐ WIDOWED ☐ DIVORCED ☐ NEVER MARRIED (If so, do not complete Items 17B through 21B)

17B. SPOUSE'S BIRTHDATE: 5/16/46

17C. NUMBER OF TIMES YOU HAVE BEEN MARRIED: 1

17D. NUMBER OF TIMES YOUR PRESENT SPOUSE HAS BEEN MARRIED: 1

17E. IS YOUR SPOUSE ALSO A VETERAN? ☐ YES ☒ NO (If "Yes," complete Item 17F, if known)

17F. SPOUSE'S VA FILE NO: C-

18A. DO YOU LIVE TOGETHER? ☒ YES ☐ NO (If "No," complete Items 18B through 18D)

18B. REASON FOR SEPARATION

18C. PRESENT ADDRESS OF SPOUSE

18D. AMOUNT YOU CONTRIBUTE TO YOUR SPOUSE'S SUPPORT-MONTHLY: $

18. CHECK (x) WHETHER YOUR CURRENT MARRIAGE WAS PERFORMED BY:
☒ CLERGYMAN OR AUTHORIZED PUBLIC OFFICIAL

A 6

VA FORM 21-526 AUG. 1982 (WHICH WILL NOT BE USED)

NOTE: Furnish the following information about each of your marriages. A certified copy of the public or church record of your CURRENT marriage is required.

20A. DATE AND PLACE OF MARRIAGE	20B. TO WHOM MARRIED	20C. TERMINATED (Death, Divorce)	20D. DATE AND PLACE TERMINATED
4/20/68 Vancouver, Wa	Sharon K. Watts	—	—

FURNISH THE FOLLOWING INFORMATION ABOUT EACH PREVIOUS MARRIAGE OF YOUR PRESENT SPOUSE

21A. DATE AND PLACE OF MARRIAGE	21B. TO WHOM MARRIED	21C. TERMINATED (Death, Divorce)	21D. DATE AND PLACE TERMINATED

IDENTIFICATION OF CHILDREN AND INFORMATION RELATIVE TO CUSTODY

NOTE: Furnish the following information for each of your unmarried children. A certified copy of the public or church record of birth or court record of adoption is required.

22A. NAME OF CHILD (First, middle initial, last)	22B. DATE OF BIRTH (Month, day, year)	*22C. SOCIAL SECURITY NUMBER OF CHILD	22D. CHECK EACH APPLICABLE CATEGORY: MARRIED PREVIOUSLY	STEPCHILD OR ADOPTED	ILLEGITIMATE	OVER 18 & ATTENDING SCHOOL	SERIOUSLY DISABLED
Walter J. Kisor	7/9/69						
Patricia L. Kisor	1/18/72						

22E. NAME AND ADDRESS(ES) OF PERSON(S) HAVING CUSTODY OF CHILD(REN), IF OTHER THAN VETERAN

23A. IS YOUR FATHER DEPENDENT UPON YOU FOR SUPPORT? ☐ YES ☒ NO (If "Yes," complete 23B)	23B. NAME AND ADDRESS OF DEPENDENT FATHER	23C. IS YOUR MOTHER DEPENDENT UPON YOU FOR SUPPORT? ☐ YES ☒ NO (If "Yes," complete 23D)

23D. NAME AND ADDRESS OF DEPENDENT MOTHER	23E. NAME AND ADDRESS OF NEAREST RELATIVE	23F. RELATIONSHIP OF NEAREST RELATIVE
	Mrs Elizabeth S. Kisor	mother

NATURE AND HISTORY OF DISABILITIES

24 NATURE OF SICKNESS, DISEASE OR INJURIES FOR WHICH THIS CLAIM IS MADE AND DATE EACH BEGAN

Post Traumatic Stress Disorder -

25A. ARE YOU NOW OR HAVE YOU BEEN HOSPITALIZED OR FURNISHED DOMICILIARY CARE WITHIN THE PAST 3 MONTHS? ☐ YES ☒ NO (If "Yes," complete 25B and 25C)	25B. DATES OF HOSPITALIZATION OR DOMICILIARY CARE	25C. NAME AND ADDRESS OF INSTITUTION

NOTE: Items 26, 27, and 28 need NOT be completed unless you are now claiming compensation for a disability incurred in service.

IF YOU RECEIVED ANY TREATMENT WHILE IN SERVICE, COMPLETE THE FOLLOWING INFORMATION

26A. NATURE OF SICKNESS, DISEASE OR INJURY	26B. DATES OF TREATMENT	26C. NAME, NUMBER OR LOCATION OF HOSPITAL, FIRST-AID STATION, DRESSING STATION OR INFIRMARY	26D. ORGANIZATION AT TIME SICKNESS, DISEASE OR INJURY WAS INCURRED

LIST CIVILIAN PHYSICIANS AND HOSPITALS WHERE YOU WERE TREATED FOR ANY SICKNESS, INJURY OR DISEASE SHOWN IN ITEM 26A, BEFORE, DURING OR SINCE YOUR SERVICE, AND ANY MILITARY HOSPITALS SINCE YOUR LAST DISCHARGE

27A. NAME	27B. PRESENT ADDRESS	27C. DISABILITY	27D. DATE
Portland Vet Center	2450 SE Belmont Portland 97214	PTSD	for last year

LIST PERSONS OTHER THAN PHYSICIANS WHO KNOW ANY FACTS ABOUT ANY SICKNESS, DISEASE OR INJURY SHOWN IN ITEM 26A, WHICH YOU HAD BEFORE, DURING OR SINCE YOUR SERVICE

28A. NAME	28B. PRESENT ADDRESS	28C. DISABILITY	28D. DATE
Sharon K. Kisor	see # 2	PTSD	—

IF YOU CLAIM TO BE TOTALLY DISABLED (Complete Items 29A through 33E)

29A. ARE YOU NOW EMPLOYED?	29B. IF YOU WERE SELF-EMPLOYED BEFORE BECOMING TOTALLY DISABLED, WHAT PART OF THE WORK DID YOU DO?
29C. DATE YOU LAST WORKED	29D. IF YOU ARE STILL SELF-EMPLOYED WHAT PART OF THE WORK DO YOU DO NOW?

30A. EDUCATION (Circle highest year completed)	30B. NATURE OF AND TIME SPENT IN OTHER EDUCATION AND TRAINING
1 2 3 4 5 6 7 8 (GRADE SCHOOL) 1 2 3 4 (HIGH SCHOOL) 1 2 3 4 (COLLEGE)	

LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, FOR ONE YEAR BEFORE YOU BECAME TOTALLY DISABLED

31A. NAME AND ADDRESS OF EMPLOYER	31B. KIND OF WORK	31C. MONTHS WORKED	31D. TIME LOST FROM ILLNESS	31E. TOTAL EARNINGS
			—	

LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, SINCE YOU BECAME TOTALLY DISABLED

32A. NAME AND ADDRESS OF EMPLOYER	32B. KIND OF WORK	32C. MONTHS WORKED	32D. TIME LOST FROM ILLNESS	32E. TOTAL EARNINGS
	S/C			

NET WORTH OF VETERAN AND DEPENDENTS (See attached instructions for Items 33A to 33E inclusive)

NOTE: Items 33A through 33E should be completed ONLY if you are applying for non-service-connected pension.

ITEM NO.	SOURCE	AMOUNTS				
		VETERAN	SPOUSE	NAME OF CHILDREN		
33A.	STOCKS, BONDS, BANK DEPOSITS	$	$	$	$	$
33B.	REAL ESTATE (Do not include residence)					
33C.	OTHER PROPERTY					
33D.	TOTAL DEBTS					
33E.	NET WORTH	$			$	$

INCOME RECEIVED AND EXPECTED FROM ALL SOURCES

NOTE: Items 34A through 35E should be completed ONLY if you are applying for non-service-connected pension

34A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANY BENEFITS FROM THE SOCIAL SECURITY ADMINISTRATION EITHER THAN SSI OR RAILROAD RETIREMENT BOARD? ☐ YES ☐ NO (If "Yes," complete Items 34B through 34F as applicable)	34B. MONTHLY AMOUNT (Include Medicare Deduction)	34C. BEGINNING DATE	34D. DATE YOU EXPECT BENEFITS TO BEGIN
	VETERAN $		
	SPOUSE $		
	34E. WILL YOU OR YOUR SPOUSE APPLY FOR EITHER BENEFIT DURING THE NEXT 12 MONTHS? ☐ YES ☐ NO	34F. DATE OF INTENTION TO APPLY	
		VETERAN	SPOUSE

35A. HAVE YOU OR YOUR SPOUSE APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANNUITY OR REFUNDMENT BENEFITS OR ENDOWMENT INSURANCE FROM ANY OTHER SOURCE?

☐ YES ☐ NO (If "Yes," complete Items 35B through 35E, as applicable)

35B. MONTHLY AMOUNT	35C. BEGINNING DATE	35D. DATE OF INTENTION TO APPLY	35E. SOURCE OF BENEFIT
VETERAN $			
SPOUSE $			

SOURCE OF VETERAN AND DEPENDENTS' INCOME (Specify source for Items 36F, 37F and 38F "ALL OTHER INCOME" in Item 40, "REMARKS")		AMOUNT OF INCOME				
		VETERAN	SPOUSE	NAME OF CHILD/REN		
36. AMOUNT RECEIVED FROM JAN 1 TO THE DATE YOU SIGN THIS STATEMENT	A. EARNINGS	$	$	$	$	$
	B. SOCIAL SECURITY (GREEN CHECK)					
	C. OTHER ANNUITIES AND RETIREMENTS					
	D. DIVIDENDS AND INTEREST, ETC.					
	E. SUPPLEMENTAL SECURITY INCOME (GOLD CHECK)					
	F. ALL OTHER INCOME					
37. AMOUNT EXPECTED FROM DATE YOU SIGN THIS STATEMENT TO END OF THIS CALENDAR YEAR	A. EARNINGS					
	B. SOCIAL SECURITY (GREEN CHECK)					
	C. OTHER ANNUITIES AND RETIREMENTS					
	D. DIVIDENDS AND INTEREST, ETC.					
	E. SUPPLEMENTAL SECURITY INCOME (GOLD CHECK)					
	F. ALL OTHER INCOME					
38. AMOUNT EXPECTED FOR THE NEXT CALENDAR YEAR	A. EARNINGS					
	B. SOCIAL SECURITY (GREEN CHECK)					
	C. OTHER ANNUITIES AND RETIREMENTS					
	D. DIVIDENDS AND INTEREST, ETC.					
	E. SUPPLEMENTAL SECURITY INCOME (GOLD CHECK)					
	F. ALL OTHER INCOME					

39A. GROSS AMOUNT OF FINAL PAY RECEIVED	39B. DATE FINAL PAY WAS RECEIVED
$	

40. REMARKS (Identify your statements by their applicable item number. If additional space is required, attach separate sheet and identify your statements by their item numbers)

#28. 21-4142 attached - transcript of hearing / Appeal of termination VA of Columbia City, OR - Please obtain as remarks on record pertinent to claim

NOTE: Filing of this application constitutes a waiver of military retired pay in the amount of any VA compensation to which you may be entitled. See instructions for Items 14A and 14 D inclusive, Retired Pay.

CERTIFICATION AND AUTHORIZATION FOR RELEASE OF INFORMATION - I certify that the foregoing statements are true and complete to the best of my knowledge and belief. I CONSENT that any physician, surgeon, dentist or hospital that has treated or examined me for any purpose, or that I have consulted professionally, may furnish to the VETERANS ADMINISTRATION any information about myself, and I waive any privilege which renders such information confidential.

41. DATE SIGNED	42. SIGNATURE OF CLAIMANT
12/3/82	SIGN HERE X [signature]

ADDRESS TO SIGNATURES OF CLAIMANT IF MADE BY "X" MARK

NOTE: Signature made by mark must be witnessed by two persons to whom the person making the statement is personally known, and the signatures and addresses of such witnesses must be shown.

43A. SIGNATURE OF WITNESS	44A. SIGNATURE OF WITNESS
43B. ADDRESS OF WITNESS	44B. ADDRESS OF WITNESS

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false, or the fraudulent acceptance of any payment to which you are not entitled

PAGE 4

PSYCHIATRIC EXAMINATION AND POST TRAUMATIC STRESS REVIEW

KISER, James T.
SS#
C#

March 2, 1983

Mr. Kisor is a 39-year old Marine Corps Vietnam veteran who is being evaluated to determine the possible presence of post traumatic stress disorder. Prior to interviewing the veteran I reviewed a social summary prepared by Arné Henifin dated 2-11-83. In addition I also reviewed various letters and memoranda from employers involving his employment termination and charges of insubordination and violent behavior resulting in these charges. These materials are now incorporated in the veteran's file including the correspondence from National Appliance Company and a termination letter from Columbia County Road Department written to the veteran as well as a statement of various incidences which describe episodes of the veteran losing his temper or behaving in such a manner that other employees would refuse to work with him. The social summary prepared by Mr. Henifin is probably one of his longer documents. It covers in good detail his various work experiences and difficulties he had getting along with supervisors and coworkers. I also note with interest the descriptions of the veteran's wife concerning his tendency to be a perfectionist as well as his manner of being very hard on himself as well as others if certain standards are not met. He is described as being very critical of other people's work having the tendency to alienate people especially get them angry at him. I also note Mr. Henifin's statement that the veteran reported no battle problems or traumatic experiences.

The interview with the veteran was a very lengthy one, partly because of his difficulty in summarizing some of the detailed narrative accounts that he provided. I had to allow the veteran to get his story out in this fashion, because he seemed to have difficulty in providing more summarized interpretive statements. This difficulty was noted particularly when it came to describing his difficulty in getting along with superiors or anybody who has a position of influence or control over him. It was my overall impression that the veteran has some severe conflicts and psychoneurotic problems in the areas having to do with control and being under control. For this reason it is very difficult for him to talk about those very issues which disturb him the most. Nevertheless through a lengthy discourse certain themes became vividly clear: That this man responds to situations where he is under somebody else's control with a sense of rage and refusal to submit to this control. The variety of anecdotes provided, veteran related his feelings of contempt to the many people who have attempted to boss him around. He often experiences these people as stupid and incompetent, and seems to justify much of his insubordination because of this. However veteran also seems to understand that there is a process occurring within him that gets out of his control, and this frightens him. Towards the end of a very lengthy interview he described an incident in which he went to a County Commissioner's house and began using foul language in the middle of the night. This incident

had been described earlier in the interview, in the context of the alleged corruption of the Commissioner in the veteran's justification for his behavior. However the veteran later described his feeling of not being able to control his anger and his frustration having lost good employment because of this. Before terminating the interview he stated that for several weeks he has been experiencing a growing preoccupation with fantasies of getting into a fight with someone. These fantasies attract him and he is feeling the urge to hurt somebody, although he has no particular person in mind.

The veteran states that he joined the Marines at age 19 in 1962. His MOS was as a Lineman and he was trained at field wire school. He then participated in combat readiness exercises in a mortar team laying wire lines for the guns doing this between 1963 and 1964. He then began a tour in a floating batallion readiness in Southeast Asian seas between the Philippines, Korea, and Okinowa, this tour lasting one year. As far as I am told the veteran did not get involved in any disciplinary problems or experience difficulty with insubordination during that period of time. The question about his problems with authority and the military was brought up earlier in the interview when the veteran was questioned about his readiness to tolerate the arbitrary commands of a superior officer. The veteran states that during peace time he was able to understand and work within this kind of command reginen. However he then contrasted this to a situation of warfare where as individual life was at stake. He then began a long dialogue discussing how he would not submit to the authority of someone stupider or less knowledgeable than himself if this person in command was going to get the veteran killed. During this discourse he then made various allusions to the alleged stupidity of various commanding officers in Vietnam. His attitude of contempt for the leadership became very clear during this discourse. The veteran seemed to be implying that the exposure to potential combat and the implied danger did affect a change upon his adaptation, especially in relationship to his difficulty in relating to authority figures.

Veteran states that he was sent to Vietnam in July 1965. He was first based in the general area of Qua Non in the Central Highlands south of Da Nang. It was his job to install phone lines and operate radio relay installations as well as serving as perimeter guard. This period of service lasted from July through September. The veteran was then assigned to a line company as communications expert. He almost always was carrying communications wire with him for the installation of field telephone networks (this appears to be sometimes potentially useful in case the enemy attempted to jam radio communications). When the veteran was asked to describe combat situations he seemed very defensive and wanted to make certain that I understood that he was always in situations of combat danger. Nevertheless it would appear that he was involved in one major ambush which resulted in 13 deaths in a large company. The veteran does not remember how long this ambush lasted. He described the ambush in the context of the stupidity of his commanding officer's orders and judgement. This had to do with the

Lieutenant failing to recognize the dangerous ambush potential of the approaching territory. Reportedly the veteran warned the Lieutenant about this, his warnings went unheeded, and within a few minutes the ambush indeed did occur. Apparently his company was under attack from small-medium size guns from a hedgerow in the distance. This occurred during Operation Harvest Moon when the veteran was on a search operation. Apparently the Marines were pursuing the Viet Cong enemy in an operation designed to drive them towards another group of Marines approaching from the opposite direction. At one point the enemy turned around and began firing rounds, holding off the approach of the Marines. The veteran mentioned the frustration of the men who were "hot and furious" to get those VC's.

As far as I can tell the only other situations of enemy contact involved several contacts with snipers and occasional mortar rounds fired into his base of operation. It took me a long time to distill out this particular information from the veteran's account. Whenever I would ask direct questions concerning the actual amount of combat activity, this subject would get lost as he would again launch into another detailed anecdotal monologue. These monologues generally depicted various situations where the leadership made a mockery of themselves because of their stupidity. There were several anecdotes told where the veteran refused to follow the order of the commanding officer and got away with it. On one such occurrence he was ordered by a Lieutenant to stop drinking so much water (because it was being rationed because of limited supply). The veteran picked up his rifle and threatened to shoot this man if he dared mess around with him and apparently got away with it. As the veteran described this and other similar stories a pleasurable smile appeared upon his face.

ADDENDUM TO PSYCHIATRIC & POST TRAUMATIC STRESS DISORDER REVIEW

KISOR, James L. March 16, 1983
SS#

A portion of the original dictation on this PTSD examination has been lost. After reading the available portion of the written report I was able to recall enough information to render an opinion, as well as to recall what my diagnostic impression was at the time of the dictation. Specific review of symptoms related to the PTSD criteria was not available either in the report or my memory. However I do recall my distinct impression that this man suffers from a personality disorder as opposed to PTSD.

It is my general recollection that this veteran is a very angry person who is particularly concerned with issues of control between himself and other individuals. He characteristically expressed contempt for anybody in a position of authority and control over him, and his anecdotes betrayed his feelings of contempt and were often colored by this issues. An example is the descriptions of his Vietnam combat situations were couched in the framework of his basic premise: that most people who have attempted to boss him around had been inferior to him either intellectually or morally. The situation with the allegedly corrupt commissioner is a case in point. Although the veteran seemed to recognize the extensiveness of his rage and his difficulty with controlling his behavior and impulses, he also was very intent on describing the corruptness and ineptness of the people he was attacking. I recall that the veteran had involved himself in union activities where he was always fighting the establishment and informing workers of their rights so that they could not be abused. When the veteran described the various situations a sense of his own superiority was infused into the various anecdotes. The veteran's ability to threaten his commanding officer with a gun and get away with it was a source of pride for him and a source of pleasure when he had the opportunity to tell the story to me.

IMPRESSION: It was my specific impression that this man suffers from an emotional disturbance and personality disorder related to issues of control and the anger engendered when he feels that other people have power over him. I recall that I was not impressed with the finding of post traumatic stress disorder. However I cannot recall the specifics of any symptom review. In addition to the diagnosis of intermittent explosive disorder I am assigning a personality disorder diagnosis, a typical mixed type. There are some features of the obsessive compulsive personality as relates to issues of control in the rage experienced associated with this as well as some traits of perfectionism. However he is not typically an obsessive-compulsive personality.

DIAGNOSES: AXIS I. INTERMITTENT EXPLOSIVE DISORDER, DSM 312.34.
AXIS II. ATYPICAL PERSONALITY DISORDER, DSM 301.89.

\ppx21

DIAGNOSES: Continued

AXIS IV & V. SEVERITY OF STRESSOR, NOT APPLICABLE.
LEVEL OF ADAPTIVE FUNCTIONING IN THE PAST YEAR FAIR.

The Rating Board can decide whether there is sufficient information available in the available dictation to justify a clinical finding. I can simply state that I remember my initial impression that this man does not suffer from PTSD.

The veteran is competent to handle benefit funds.

3-23-83

ROBIN HENDERSON, M.D. Date

d: 3-16-83 t: 3-17-83/ak

\ppx22

NOTE: SHADED AREA TO BE COMPLETED BY INPUT ACTIVITY

Veterans Administration

RATING DECISION

1. COPY TO: [ ] INS [ ] MED [ ] DEA FOLDER [ ] R & E FOLDER [X] OTHER (Specify) DAV

2. FILE NUMBER: C-

4. DATE OF CLAIM: 12-3-82

5. DATE OF LAST EXAMINATION: 3-2-~~82~~ 83

6. DATE OF DEATH:

7. INITIALS AND SURNAME OF VETERAN: J. L. KISOR

8. SEX: [X] MALE [ ] FEMALE

9. BRANCH: A. ARMY B. NAVY C. USMC D. USCG E. USPHS F. USAF H. WAC J. AIR CORPS (For others See M31-1, App. C) C

10. ACTIVE DUTY (Mo., day, yr.): EOD 11-6-62; RAD 11-4-66

11. ADDTL. SVC: 1. WT. 2. PVE 3. SCD

12. DATE OF BIRTH: 3-30-43

13. COMBAT: 1. NONE 2. COMP 3. NON COMP 4. BOTH 1

14. EMPLOYABILITY (For compensation only): 1. EMPLOYABLE OR NOT AN ISSUE 2. UNEMPLOYABLE 1

15. COMPETENCY: 1. COMPETENT OR NOT AN ISSUE 2. INCOMPETENT 1

16. NO. OF S/C DISAB. (0 through 9) (9 to show 9 or more) 0

17. FUTURE DATE CONTROLS: PHYSICAL EXAM. MO. YR. REASON NO EXAM 01; OTHER CONTROL ACT. MO. YR. REA. 1. ESTAB. 2. CANCEL

18. DATE OF THIS RATING: MAY - 9 1983

19. NARRATIVE

J. Original claim, VA Form 526.

I. SC for post traumatic stress neurosis.

F. Vet served in Viet Nam and earned the Vietnamese Service Medal, Good Conduct Medal, and National Defense Service Medal. VA psychiatric examiner has diagnosed intermittent explosive disorder and atypical personality disorder. SMRs are negative for diagnosis or manifestations of a psychiatric illness. The report dated 2-14-83 from the Portland Vet Center has been considered.

8. NSC (PTE, VE)

9411 POST TRAUMATIC STRESS NEUROSIS, CLAIMED BY VET; NOT SHOWN BY EVIDENCE OF REOORD

9499-9400 INTERMITTENT EXPLOSIVE DISORDER (CDA)

9499-9400 ATYPICAL PERSONALITY DISORDER (CDA)

INPUT VIA TARGET
Date 5/11/83
By MAB

20. SPECIAL PROVISION CODE: 1-PAR. 29 2-PAR. 30 3-VAR 1321 4-VAR 1322 5-ANAL. RATING 6-OTHER OR COMP. 7-PAR. 29

21. SPECIAL MONTHLY COMPENSATION: A. SMC PAR CODE B. LOSS OF USE C. ANAT. LOSS D. OTHER LOSS E. HOSP. SMC

22. NO. OVER SIX

23. CLAIMANT REPRESENTED: [ ] AL [ ] VFW [X] [ ] ARC [ ] AMVETS [ ] OTHER (Specify)

24. RATING BOARD NO. III

25. R.O. NO. 348/vh

26. RATING SPECIALIST (Medical): Physician

27. RATING SPECIALIST (Legal-Occupational): E. [illegible]

28. RATING SPECIALIST (Legal-Occupational): J. [illegible] PACELLA* (306)

VA FORM 21-6796 OCT 1980 SUPERSEDES WHICH IS

15 3

U.S. Government Printing Office: 1981—341-405/R619

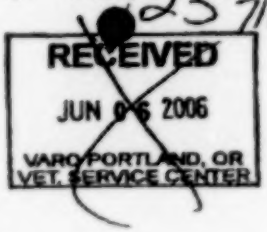
MAY 11 1983

1:34 5-2-83

23711970

RECEIVED
JUN 05 2006
VARO PORTLAND, OR
VET. SERVICE CENTER

RECEIVED
JUN 06 2006
VARO PORTLAND, OR
VET. SERVICE CENTER



June 5, 2006

James L. Kisor

United States Department of Veterans Affairs
Regional Office
1220 S.W. Third Avenue
Portland, OR 97204

HAND DELIVERED

SUBJECT: CLAIM FOR VA BENEFITS

I hereby make application for Post Traumatic Stress Disorder (PTSD) benefits, caused by my service in a United States Marine Corps infantry battalion (2nd Battalion, 7th Marine Regiment) in Vietnam, during 1965 and 1966.

In that regard, please note the attached Marine Corps documents: DD-214 - - - and - - - Marine Corps record entitled: "NAVMC 118(9) –PD" which records my direct participation on **OPERATION HARVEST MOON** with the battalion during the period Dec 9, 1965 through December 18, 1965, which was one of the most bloody and lethal operations in which my battalion - - - in terms of Marine brothers killed and injured. My participation/involvement on Harvest Moon, authorizes me to wear a Marine Corps **"COMBAT ACTION RIBBON"** (CAR). I cannot understand why the VA has continuously IGNORED this document, which records the nature of my combat service/stress.

The record will reveal during Operation Harvest Moon, that we were ambushed by VC/NVA at Ky Phu, and that I killed enemy with my M-14 rifle. That incident, in particular, was the reason why commencing December 28, 1981, that I participated weekly FOR MORE THAN ONE YEAR in the "readjustment program" at the VET CENTER on Belmont Street, here in Portland. In that regard, please note the attached copy of a letter dated February 14, 1983, from the VET CENTER/David E. Collier, MS - - Vet Center Counselor - - - to VA Adjudication Officer Pfeiffer at the Portland VA Regional Office, wherein Mr Collier emphasized the following:

> "He complained that he was encountering difficulties in controlling his anger and dealing with people in authority positions. These problems were apparently exacerbated by some of his experiences in Vietnam. . . Subsequent involvement in group and individual counseling identified additional concerns that Mr. Kisor had towards depression, suicidal thoughts

CEST 024
6/23/06 EAK

16

Record Before the Agency (RBA) Page 961

and social withdrawal. This symptomatic pattern has been associated with the diagnosis of Post-Traumatic Stress Disorder (DSM III 309.81).

Again, I cannot understand why the VA has continuously IGNORED Mr. Collier's document, which records the nature of my combat service/stress.

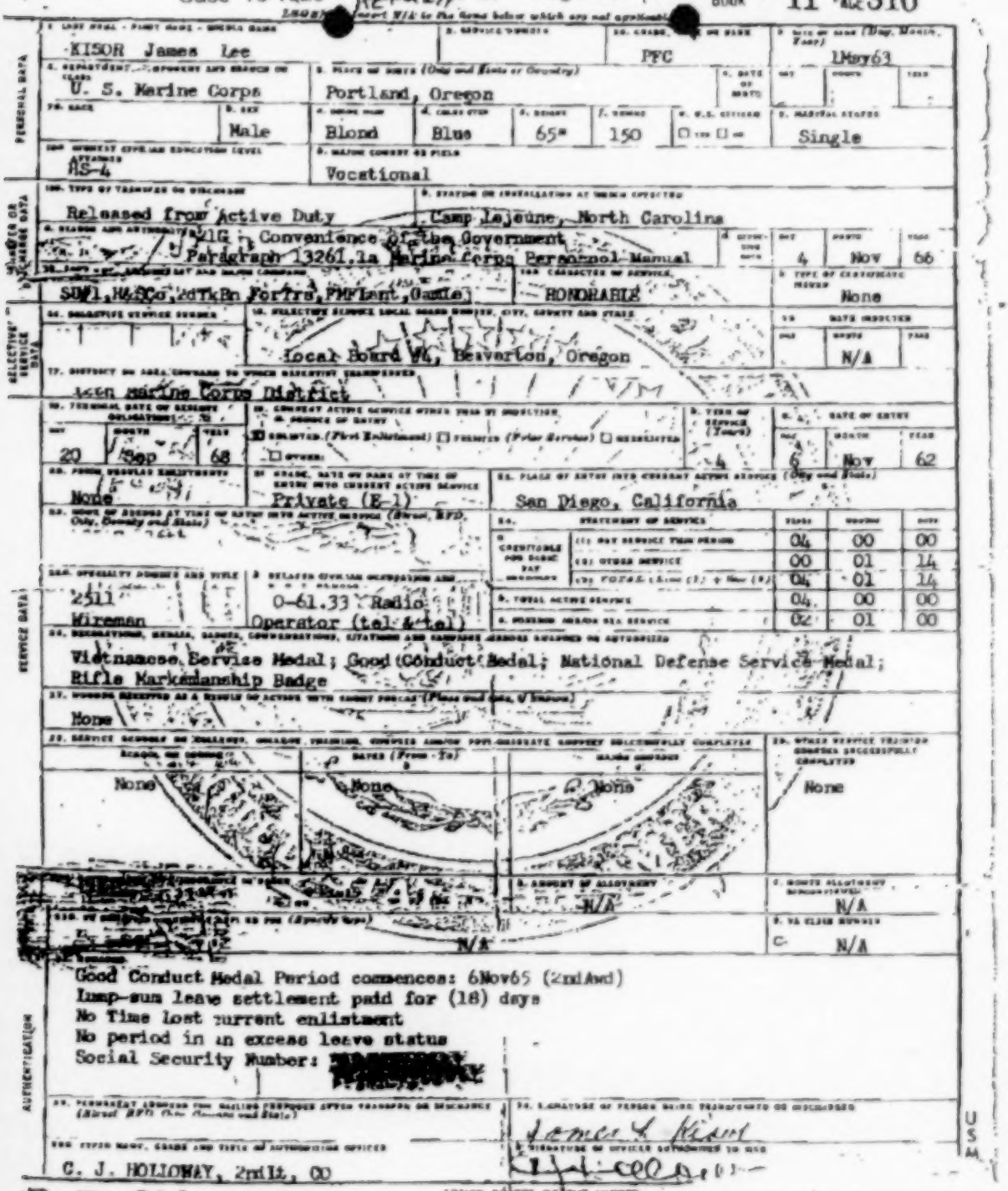
VA records will verify that I earlier filed a claim for PTSD benefits, which was improperly denied for reasons which I don't understand, in light of the facts - - - some noted above.

Thank you.

Sincerely, James L Fisher

LEGEND: Insert N/A in the items below which are not applicable

PERSONAL DATA



1. LAST NAME - FIRST NAME - MIDDLE NAME: KISOR James Lee	2. SERVICE NUMBER	3. GRADE, RATE OR RANK: PFC	4. DATE OF RANK (Day, Month, Year): 1May63
5. DEPARTMENT, COMPONENT AND BRANCH OF CLASS: U. S. Marine Corps	6. PLACE OF BIRTH (City and State or Country): Portland, Oregon	7. DATE OF BIRTH	
8. RACE	9. SEX: Male	10. HAIR: Blond	11. COLOR: Blue
12. HEIGHT: 65"	13. WEIGHT: 150	14. U.S. CITIZEN	15. MARITAL STATUS: Single
16. HIGHEST CIVILIAN EDUCATION LEVEL ATTAINED: HS-4	17. MAJOR COURSE OF FIELD: Vocational		

SEPARATION OR DISCHARGE DATA

18. TYPE OF TRANSFER OR DISCHARGE: Released from Active Duty	19. STATION OR INSTALLATION AT WHICH EFFECTED: Camp Lejeune, North Carolina		
20. REASON AND AUTHORITY: 21G - Convenience of the Government Paragraph 13261.1a Marine Corps Personnel Manual	21. EFFECTIVE DATE: 4 Nov 66		
22. LAST NAME, ADDRESS AND MAJOR COMMAND: SU#1, H&SCo, 2dTkBn Forfrs, FMFLant, Camlej	23. CHARACTER OF SERVICE: HONORABLE	24. TYPE OF CERTIFICATE ISSUED: None	

SELECTIVE SERVICE DATA

25. SELECTIVE SERVICE NUMBER	26. SELECTIVE SERVICE LOCAL BOARD NUMBER, CITY, COUNTY AND STATE: Local Board #4, Beaverton, Oregon	27. DATE INDUCTED: N/A	
28. DISTRICT OR AREA COMMAND TO WHICH DESERTIVE TRANSFERRED: 12th Marine Corps District			

SERVICE DATA

29. TERMINAL DATE OF RESERVE OBLIGATION: 20 Sep 68	30. CURRENT ACTIVE SERVICE OTHER THAN BY INDUCTION: ☒ ENLISTED (First Enlistment) ☐ FURNISHED (Prior Service) ☐ REENLISTED ☐ OTHER	31. TERM OF SERVICE (Years): 4	32. DATE OF ENTRY: 6 Nov 62
33. FROM REGULAR ENLISTMENTS: None	34. GRADE, RATE OR RANK AT TIME OF ENTRY INTO CURRENT ACTIVE SERVICE: Private (E-1)	35. PLACE OF ENTRY INTO CURRENT ACTIVE SERVICE (City and State): San Diego, California	
36. HOME OF RECORD AT TIME OF ENTRY INTO ACTIVE SERVICE (Street, RFD, City, County and State):			

37. SPECIALTY NUMBER AND TITLE	38. DELAYED CIVILIAN OCCUPATION AND D.O.T. NUMBER	39. STATEMENT OF SERVICE	YEARS	MONTHS	DAYS
2511 Wireman	0-61.33 Radio Operator (tel & tel)	a. CREDITABLE FOR BASIC PAY PURPOSES: (1) NAT SERVICE THIS PERIOD	04	00	00
		(2) OTHER SERVICE	00	01	14
		(3) TOTAL (Line (1) + Line (2))	04	01	14
		b. TOTAL ACTIVE SERVICE	04	00	00
		c. FOREIGN AND/OR SEA SERVICE	02	01	00

40. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED: Vietnamese Service Medal; Good Conduct Medal; National Defense Service Medal; Rifle Marksmanship Badge

41. WOUNDS RECEIVED AS A RESULT OF ACTION WITH ENEMY FORCES (Place and date, if known): None

42. SERVICE SCHOOLS OR COLLEGES, COLLEGE TRAINING, COURSES AND/OR POST-GRADUATE COURSES SUCCESSFULLY COMPLETED

SCHOOL OR COURSE	DATES (From - To)	MAJOR COURSES	43. OTHER SERVICE TRAINING COURSES SUCCESSFULLY COMPLETED
None	None	None	None

44. [illegible]	45. AMOUNT OF ALLOTMENT: N/A	46. MONTH ALLOTMENT DISCONTINUED: N/A
47. [illegible] (Specify type): N/A		48. VA CLAIM NUMBER: N/A

AUTHENTICATION

Good Conduct Medal Period commences: 6Nov65 (2ndAwd)
Lump-sum leave settlement paid for (18) days
No Time lost current enlistment
No period in an excess leave status
Social Security Number: [redacted]

49. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER TRANSFER OR DISCHARGE (Street, RFD, City, County and State)	50. SIGNATURE OF PERSON BEING TRANSFERRED OR DISCHARGED: James L. Kisor
51. TYPED NAME, GRADE AND TITLE OF AUTHORIZING OFFICER: C. J. HOLLOWAY, 2ndLt, CO	52. SIGNATURE OF OFFICER AUTHORIZED TO SIGN: [signature]

USM

DD FORM NOV 55 214 REPLACES EDITION OF 1 JUL WHICH IS OBSOLETE

Apps27

18

COMBAT HISTORY—EXPEDITIONS—AWARDS RECORD

COMBAT HISTORY—EXPEDITIONS

DATE OF ENTRY	DETAILS	DATES FROM (MM)—	DATES TO—	SIGNATURE
AUG 2 2 1965	PARTICIPATED IN COUNTER-INSUR-GENCY OPERATIONS REPUBLIC OF SOUTH VIET NAM	JUL 7 1965	13May66	N H Groom Jr
DEC 1 8 1965	PARTICIPATED IN OPERATION "HARVEST MOON", RVN	DEC 9 1965	DEC 1 8 1965	W.T. Berryan BY DIR

AWARDS

DESCRIPTION	STARS, DEVICES	DATE APPROVED	APPROVED BY	DATE MEDAL ISSUED	SIGNATURE
VietnameseServMdl			President U.S.		N H Groom Jr
X GCMDL		29Nov65	CO,H&SCo2ndBn7thMar		N H Groom Jr
NATDEFSM		5May66	SecNav		[illegible]

NAME (Last) KISOR (First) James (Middle) Lee SERVICE NO.

NAVMC 118(9)-PD (REV. 11-55) SUPERSEDES PREVIOUS EDITION WHICH

U. S. GOVERNMENT PRINTING OFFICE: 1967 O - 42931

19 28

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES — ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

CORRECTION TO DD FORM 214, CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle Initial)	2. COMPONENT AND BRANCH	3. SOCIAL SECURITY NUMBER (Also, Service Number if applicable)
KISOR James Lee	U. S. Marine Corps	
4. MAILING ADDRESS (Include ZIP Code)		

5. ORIGINAL DD FORM 214 IS CORRECTED AS INDICATED BELOW:

ITEM NO.	CORRECTED TO READ
26.	SEPARATION DATE ON DD FORM 214 BEING CORRECTED - 4 Nov 68 64389-2007-5892-KP Change to DD-215 issued NOV 13 2006 Del: Vietnamese Service Medal Presidential Unit Citation Add: Combat Action Ribbon Presidential Unit Citation (w/1 Bronze star) Navy Unit Commendation Vietnam Service Medal (w/2 Bronze stars)

8. DATE (YYYYMMDD)	7. OFFICIAL AUTHORIZED TO SIGN			
	a. TYPED NAME (Last, First, Middle Initial)	b. GRADE	c. TITLE	d. SIGNATURE
20071005	DOMBROSKI, R. M.	CWO 2	MELNO; NPRC	

DD FORM 215, FEB 2000 — PREVIOUS EDITION IS OBSOLETE — SERVICE - 2

2011 JAN 25 PM 12:04

Department of Veterans Affairs

Memorandum

Date: 06/22/2007

From: Manager, Veterans Service Center

RE: *Kisor, James L. C:*

Subj: Formal Finding of Information Required to Document the Claimed Stressor

To: File

a. Veteran's primary stressor was his participation in Operation Harvest Moon in Vietnam. The veteran gives us the date of 12/18/1965.
b. We have not yet received the veteran's 201 file However, his service medical records verify his service in Vietnam with 2nd Battalion 7th Marines from as early as June 1965 to as late as May 1966. The attached extract from the daily log of the 2nd Battalion 7th Marines details the events the veteran describes. The battalion was attacked at Ky Phu Hamlet by an estimated VC battalion They were attacked with small arms, crew served weapons, hand grenades, and mortars Although US casualties are not listed the extract shows over 100 VC killed in the action.
c. Stressor verified.

Signature/Position: Chet Taylor, Regional Office JSRCC Coordinator
SVSR/213

\ppx30

DECLASSIFIED

S-2, 2nd Battalion, 7th Marines

Chu Lai, South Vietnam

TIME IN	TIME OUT	SERIAL NO	DATE TIME GROUP	INCIDENTS, MSG, ORDERS
				BT 134217 received long range sniper fire. Fire was returned, and the VC broke contact.
				A VC from the 519th Bn surrendered to C Company in the vicinity of BT 0721. VC had the following equipment: 1 knife, 2 grenades, and a pack. Total VC apprehended for the period: 1 PAVN rallier.
			182400H	Summary of operation Harvest Moon for the period 180000H to 182400H. At 180800, a VC threw grenade at elements of C Company vicinity BT 170221. VC was KIA. At 181330H, battalion forward and rear elements taken under heavy fire by mortar, recoilless rifle, and automatic weapons. Estimated size of VC unit a battalion minus. VC WIA confirmed enemy unit as the 80th Battalion of the 1st Regiment. Location of contact: Ky Phu Hamlet, grid square BT 2122. VC were well camouflaged and dug into concealed positions. Weapons known to have been employed by the VC forces were 81mm mortars, 60mm mortars, 57mm recoilless rifles, .50 caliber machine guns, and other small arms. All VC contacted were well armed and equipped. Total VC KIA, POW, and equipment as follows: VC KIA--105; est VC KIA--75; POW--2, both WIA; equipment: 6 BAR's, 6 M-1 rifles, 3 carbines (US), 1 Enfield rifle, 1 MAS-36 rifle, 2 .30 caliber MG's with 1 set of tripods, 4 French submachine guns, 1 US Thompson SMG, 1 Chicom MG, 1 Chicom carbine, 2 Chicom rocket launchers, 1 60mm mortar, 1 81mm mortar tube, 2 AN/PRC-10A radios set on frequency 45.3, and 1 .30 caliber MG. Documents captured include booklets with VC names, sketch maps of area along National route 1, and sketch map of Ky Phu Hamlet and contact area.
			192400H	Summary of operation Harvest Moon for the period 190000H to 192400H. At 191130H,

\ppx31

Virtual VA 06/22/07
(213/CAT. 16)

DECLASSIFIED

August 24, 2007

James L Kisor
[redacted]

Mr. Craig Moore
Acting Regional Director
Department of Veterans Affairs
Regional Office
Federal Building
1220 S W Third Avenue
Portland, OR 97204

CERTIFIED MAIL/RETURN RECEIPT
Hand Delivered

SUBJECT: NEW AND MATERIAL EVIDENCE SUBMITTED TO REOPEN 1982 PTSD CLAIM

Dear Mr. Moore:

This letter has reference to BOTH of my following described VA claims:

RECEIVED
VARO PORTLAND, OR
AUG 24 2007
MAIL OPERATING CENTER

1. **Currently pending second application**/claim for service-connection for Post Traumatic Stress Disorder ("PTSD" herein) benefits, which I HAND DELIVERED" to the Portland VA Regional Office on June 5, 2006, concerning which no decision has been made to date.

2. **Original 1982 application**/claim for service-connection for PTSD benefits dated December 3, 1982, which the Portland VA Regional Office DENIED on May 9, 1983, causing me to file a NOTICE OF DISAGREEMENT letter dated May 24, 1983.

Significantly as concerns my above referenced now decades old meritorious original 1982 PTSD claim which was improperly denied by the Portland VA Regional office during 1983, VA statute law provides as follows at Title 38 United States Code, Section 5108:

> "Reopening disallowed claims
> If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary *shall* reopen the claim and review the former disposition of the claim." *(emphasis added)*

In accordance with that clear CLAIM REOPENING mandate in law, I hereby present the following NEW AND MATERIAL EVIDENCE which I recently secured:

1. "COMBAT ACTION RIBBON"

By written notification dated July 2, 2007, I was awarded a U.S. Marine Corps "COMBAT ACTION RIBBON" ("CAR"), from the National Personnel Records Center (Navy Personnel Command Retired Records Section), which Ribbon was typed to the front of the: "TRANSMITTAL OF AND/OR ENTITLEMENT TO AWARDS" form: "NAVPER 1650/65" dated: July 2, 2007. Accordingly, please find attached to this letter a true copy of my above described CAR award FORM,

which I hereby submit as "NEW AND MATERIAL EVIDENCE" marked: "EXHIBIT A".

2. "CURRENT PSYCHIATRIC EVALUATION REPORT DIAGNOSING SEVERE CHRONIC PTSD"

On June 27, 2007, I participated in an extensive interview and review of my medical records with Psychiatrist Donald L. Davies, M.D, which resulted in a 12 page Medical Report (and 1 page Curriculum Vitae) dated July 20, 2007, diagnosing severe Post-Traumatic Stress Disorder, Chronic, related to my military duties in Vietnam when serving in the 2nd Battalion, 7th Marine Regiment ("2/7") under Command of Lt. Col [redacted]. The VA has been aware since my 1982 PTSD claim, that I directly participated on combat Operation Harvest Moon and, in particular, the ambush of 2/7 by the 80th VC Battalion in the vicinity of Ky Phu village when I killed 2 VC snipers. Marine Corps records included in this letter and attachments, clearly evidence the fact that just during the ambush phase of Operation Harvest Moon, that 11 Marines from 2/7 were killed and 71 wounded. Additionally, 104 VC were killed in action. The entire Harvest Moon combat operation resulted in 45 Marines killed and 218 wounded. Additionally, 407 enemy Vietcong killed in action. Accordingly, please find attached to this letter as "NEW AND MATERIAL EVIDENCE", the original above described medical report/diagnosis from Dr. Davies, marked: "EXHIBIT B".

3. OFFICIAL U S MARINE CORPS "AFTER ACTION REPORT" CONCERNING OPERATION "HARVEST MOON" AND THE VC AMBUSH AT KY PHU.

Please take specific note of the December 18, 1965, entry which appears on my: "COMBAT HISTORY-EXPEDITIONS – AWARDS RECORD" document in my Marine Corps "Service Record Book" ("SRB") on Form: "NAVMC 118(9)-PD (REV. 11-55), and evidences in pertinent part, the following:

> "PARTICIPATED IN OPERATION 'HARVEST MOON', RVN" from "DEC 9 1965 TO DEC 18, 1965."

In that regard and in order to facilitate your immediate REOPENING and re-adjudication of my 1982, PTSD claim, as well as to enable the Rating Board to understand the extent of the carnage, suffering, death, sacrifice, etc., which took place during Operation Harvest Moon and, in particular, the lethal VC ambush at Ky Phu, I have located the official Marine Corps "AFTER ACTION REPORT concerning "OPERATION HARVEST MOON" DECEMBER 1965. Accordingly, please find attached to this letter as "NEW AND MATERIAL EVIDENCE" a complete copy (6 pages long) of the above described "AFTER ACTION REPORT" marked: : "EXHIBIT C", which I copied from an Internet website, such as the following examples:
http://www.3rdmarines.net/Vietnam_operation_harvestmoon2.htm and
http://www.l33nemvets.com/Vietnam_operation_harvestmoon2.htm.

4. MARINE BUDDIES KILLED IN ACTION IN VIETNAM *

The following is a partial list of my fellow Marine Buddies who were Killed In Action (KIA) when serving in Vietnam. List does NOT include many more wounded.

The names followed by a single asterisk (*) identify those Marines who died in my 2/7 Regiment. Names followed by a double asterisk (**) identify those Marines who died in H&S Company and my Communications Platoon. Names followed by triple asterisks (***) were bootcamp Platoon #377 buddies:

NAME	RANK	BRANCH OF MILITARY	SERIAL#	DATE KILLED IN ACTION
[redacted]				

* List not all inclusive – only includes my buddies that I know were killed.

Additionally, during Operation Harvest Moon, when the Viet Cong ambushed my battalion in the village of Ky Phu, I was with H&S Company in the open paddies west of the hamlet and under a hail of incoming fire. It was then that I personally killed 2 Viet Cong snipers with my M14 rifle as their heads emerged from spider traps. This fact has tormented me during the past 41+ years. At that same time [redacted] - - one of my Marine buddies in our 2/7 Communications Platoon - - was killed when a Viet Cong bullet ripped into his throat. I will never forget seeing his dead body. It also had a strong impact on me when [redacted], another Marine buddy in my 2/7 Communications Platoon - - was shot in the head at the same time as [redacted]. I can still see [redacted] in my minds eye, lying on a stretcher in Ky Phu village, waiting to be evacuated by helicopter. My exposure to in-service stressors related to combat is beyond dispute.

You are aware that my now having been awarded a USMC "Combat Action Ribbon" presumptively establishes that I engaged in combat with the enemy while I was serving in Vietam during 1965 and 1966 as a member of the 2nd Battalion, 7th Marine Regiment/ Infantry Battalion, and should be enough given the totality of the circumstances as outlined herein, to establish "the claimed in[-]service stressor" and thus, presumably, combat status, see 38 C.F.R. 3.304(f)).

As concerns the legal duty for the Portland VA Regional Office to immediately REOPEN my 1982 PTSD claim based upon submission of the above identified **NEW AND MATERIAL EVIDENCE**, and expedite a new decision, please note the following highly relevant excerpt from a decision by the United States Court of Appeals for Veterans Claims:

"A. Reopening
The RO denied the appellant's claim for service connection for PTSD in a June 1985 decision. R. at 77. That decision is final and may not be reopened unless, pursuant to 38 U.S.C. 5108, "new and material evidence" is presented or secured with respect to the claim. See 38 U.S.C. 7105(c). Evidence is "new" if it is not merely cumulative of prior evidence of record; evidence is "material" where it is relevant to and probative of the issue at hand and where there is a reasonable possibility that, when viewed in the context of all the evidence, both new and old, it would change the outcome. See Evans v. Brown, 9 Vet.App. 273, 283-84 (1996); Struck v. Brown, 9 Vet.App. 145, 151 (1996); Blackburn v. Brown, 8 Vet.App. 97, 102 (1995). The determination as to whether evidence is "new and material" is a question of law, subject to de novo review in this Court under 38 U.S.C. 7261(a)(1). Masors v. Derwinski, 2 Vet.App. 181, 185 (1992). *Here, the evidence secured since the June 1985 decision includes (1) Bureau of Naval Personnel and NPRC documents indicating that the appellant had been awarded the Combat Action Ribbon and (2) the November 1993 VA examination report diagnosing severe, chronic PTSD related to the appellant's duty in Vietnam. These items are "new" because they are not cumulative of evidence that was before the RO in June 1985. They are "material" because they are relevant to and probative of whether the appellant currently has a medically diagnosed case of PTSD that is causally related to his service, see Struck v. Brown, 9 Vet.App. 145, 151 (1996), and because, when viewed in the context of all the evidence here, they create a "reasonable possibility" of changing the outcome.* Blackburn v. Brown, 8 Vet.App. 97, 102 (1995). . . "

SOURCE: Marcoux v. Brown, 10 Vet.App. 3 (1996).

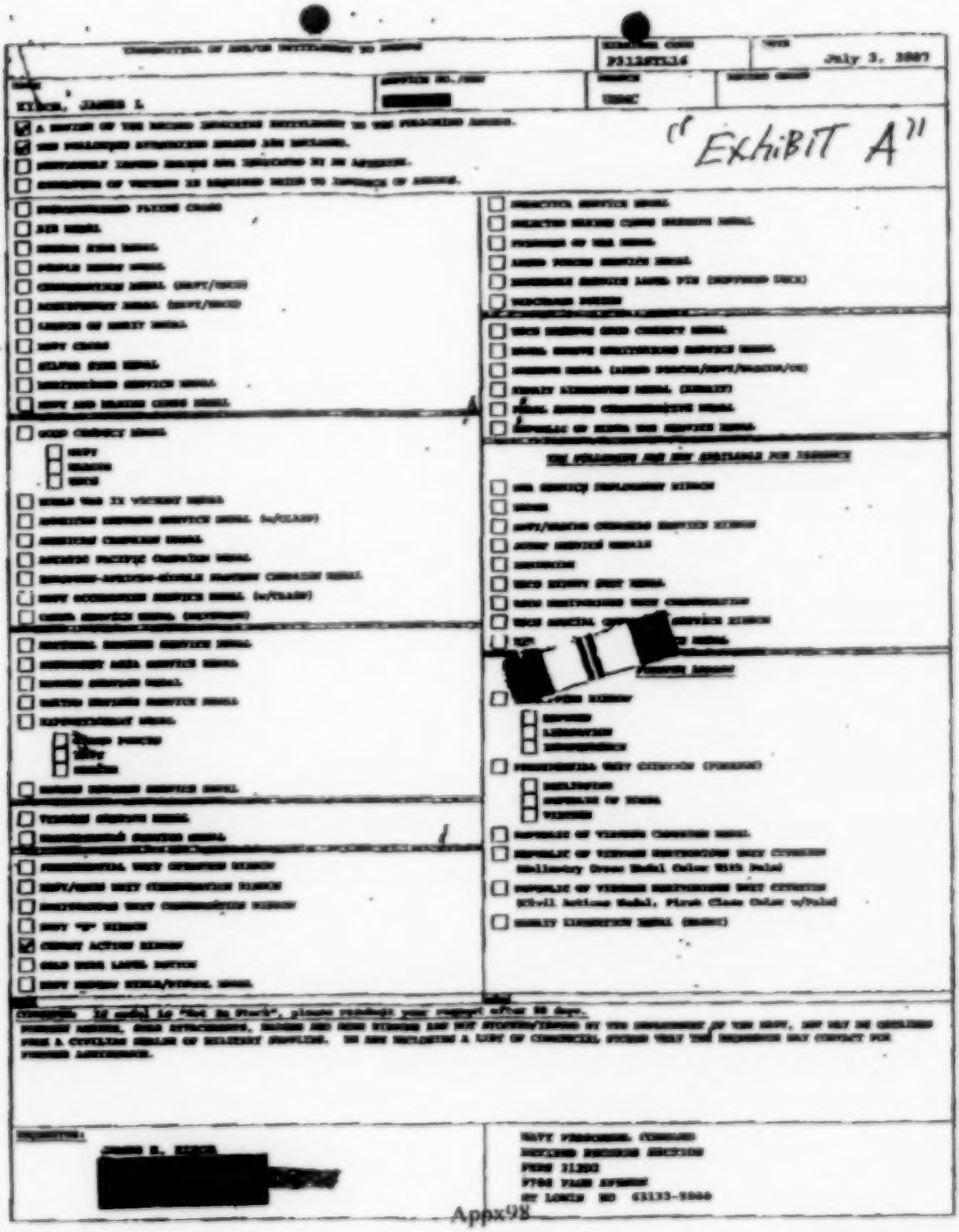
Please know that I continue to be very troubled when I think about the Portland VA Regional Office DENIAL of my 1982 Meritorious PTSD claim in the face of my having then directly participated in more than 50 meetings/sessions at the Portland Vets Center, combined with the fact that the Vet Center Manager David Collier M.S., had then concluded in his February 14, 1983, letter that my *symptoms* were consistent with PTSD. Additionally, when the VARO denied my 1982 PTSD claim, it clearly made NO effort to explore my eligibility for a USMC "Combat Action Ribbon" ("CAR"), even though the involved VA adjudicators must have known that I never could have been awarded a CAR by reason of the fact that I was separated from the Marine Corps during 1966, but the CAR award wasn't created until 1969 – but made retroactive. How could VA adjudicators deny my claim, knowing that I had participated in extremely bloody and lethal Operation Harvest Moon and the ambush at Ky Phu? Additionally, I will never understand why the then involved VA adjudicator DENIED my PTSD claim, knowing that the VA record clearly revealed that VA psychiatrist Henderson had clarified that a portion of the VA ordered psychiatric examination records had been "LOST" - - - but thereafter provided a diagnosis notwithstanding that fact My subsequent request that another VA psychiatrist examine me, was totally ignored by the Portland VARO. The United States Constitution which I was injured in combat defending on a foreign battlefield, guarantees me the right to "Due Process of Law" which is the right to a FAIR and IMPARTIAL government/VA process. The Portland VARO's handling of my 1982 PTSD claim, was neither "Fair" nor was it "Impartial."

Please immediately REOPEN my December 1982 claim for service-connection for PTSD, and review the disposition. Thank you.

Sincerely Yours,

James L Kizer

cc: United States Senator Ron Wyden



"EXHIBIT A"

Appx98

Exhibit B

DONALD L. DAVIES, M.D.
Psychiatry
3333 Mission Drive
Santa Cruz, CA 95065

CURRICULUM VITAE

QUALIFICATIONS:

EDUCATION:

Tulane University, 1968-1970
University of Miami, Miami, Florida, B.S., cum laude, 1970-1972
University of Miami, School of Medicine, M.D., 1976

TRAINING:

R-6 Intern, Herrick Memorial Hospital, Berkeley, California, 1976-1977
Psychiatric Resident, Herrick Memorial Hospital, 1977-1979

EXPERIENCE:

Staff Psychiatrist, Santa Cruz County Mental Health Services,
Santa Cruz, California, 1980-1981
Private Practice Psychiatry, Santa Cruz, California, 1980-Present
Medical Staff, Dominican Santa Cruz Hospital, Santa Cruz, California, 1980-1985

WORKER'S COMPENSATION:

Qualified Medical Examiner, State of California, 1994-1999

DONALD L. DAVIES, M.D.
Psychiatry
3333 Mission Drive
Santa Cruz, CA 95065

July 20, 2007 CONFIDENTIAL, FOR ADMINISTRATIVE PURPOSES ONLY

Department of Veterans Affairs

Re: Claimant: James L. Kisor
Social Security No.: [redacted]

Dear Sirs:

The following report represents a three-hour interview with Mr. Kisor in my office in Santa Cruz on June 23, 2007. The following report will represent my findings in this extensive interview and my review of medical records provided me by Mr. Kisor. Mr. Kisor sought psychiatric evaluation for a determination as to any possible psychiatric disability he may have sustained as a consequence of his military service. My findings will be described with respect to the interview, and the medical records he produced, with a discussion of the diagnoses. And based on his diagnosis, the issue of permanent disability will be addressed, if applicable.

IDENTIFYING INFORMATION:

Mr. Kisor is a 64-year-old married man, currently living in Scappoose, Oregon. He is currently retired from the recycling metal business, a position he states he worked in until 1998, when he was laid off. Since that time, he has had one additional episode of formal employment, lasting approximately six days. Subsequently, he was on Unemployment until his benefits ran out.

At this time, Mr. Kisor makes some income picking up and selling scrap metal. His wife works. He has been drawing Social Security benefits for approximately one year.

The claimant describes attending a Veterans outreach program sometime in late 1981. He recalls sometime in 1981 he went to the Disabled American Veterans association and applied for disability benefits, alleging he had incurred trauma from his military service. He states that he was denied at this point. He has reopened his application sometime in 2005. The claimant states he has not received any psychiatric treatment at this time.

HISTORY OF PRESENT ILLNESS:

Mr. Kisor states that he enlisted in the Marine Corps in November of 1962. He served in Vietnam between July 1965 and May of 1966. He was discharged from the Marines in November of 1966, as a private first class-E2. He states that he received two medals, one for national defense and the other for good conduct. Subsequently, his unit received two Presidential citations and a Navy unit citation. Mr. Kisor states that he worked in communications as a field wire man. During his service in Vietnam, the claimant was involved in two well-known military operations. One of these was called Harvest Moon, and the other was based on fighting in the general area of Qui Nhon in the central highlands, south of Da Nang.

With regard to his service in Vietnam, the claimant describes the Harvest Moon military operation. At this time, he was carrying two W-8 phones, in addition to a half-mile of wire. He also carried his M-14 with six magazines of ammunition, as well as his flak jacket, rations, and other equipment. At this time, the claimant forged the river during monsoon season. This was a harrowing and life-threatening situation for a number of reasons. First of all, the claimant states that the enemy "all knew where we are." He said ambushes in Vietnam were a frequent, if not constant, fact of military life. When he was between rice paddies and a hill, he was knocked down. At that point, he laid down. For an unknown period of time, he was unable to hear or see. Then he heard someone say, "Stay down." At that point, the claimant states that he crawled to another soldier. At this point, he had never fired his M-14 before. His gun did not fire properly, and this took, and this happened several times. At this point, he was under fire and a sniper was shooting at him and the men around him. Under fire, the claimant was able to shoot a sniper, who was popping up from a secured position, by timing his shot for when he anticipated the sniper would emerge from his hiding place to shoot. At this particular time, the company supply clerk was killed, and he fell running with the stretcher. He also saw a radio operator he had known for one year killed at this time.

On December 19th, the claimant states that, "The day after everything happened," he and the people in his unit were under fire. Fellow soldiers in the infantry were shooting over his head, and the claimant states he could easily have been shot. At one point, a 10- or 15-year-old boy was in the area. One of Mr. Kisor's fellow infantrymen shot this boy. This was extraordinarily upsetting for Mr. Kisor, and he said, "You guys…why did you shoot that kid…." Subsequently, the claimant was not only upset but in fear and did his best to get back to base camp.

The claimant describes a subsequent military operation, Qui Nhon, that he was involved in. He described this as a search-and-destroy mission. The first sergeant was wounded in the head during this mission. At some point, this particular sergeant was wounded in the head and subsequently died. During this mission, the claimant states he agreed to walk point, as he actually felt it was safer, if there was to be an ambush. At some point during the maneuver, Mr. Kisor states that he and his two or three soldiers were told to go left. Subsequently, they had no radio contact or support. Under fire, they went for cover, and the claimant recalls hearing bullets zipping past his head. He had no compass and no map. They were uncertain how to get out of there, as there was no radio contact. The claimant states that this was a dangerous situation and he felt unsupported in it.

Another incident happened during the Qui Nhon period. The claimant states that he volunteered for a night patrol, following external hemorrhoid surgery. He remembers being ambushed during that time. At one point he was threatened by an officer, who said to Mr. Kisor after an order, "I'm God here...." The claimant recalls that it was a dark night and in the morning they had to clear anti-personnel mines, to avoid injury. During this mission there was another threat the claimant that he received from an officer. Mr. Kisor states that from the time you arrive in Vietnam, there are "opportunities for them to get to you; to ambush you." He said he was unable to relax, as there were constant tasks required of a radio operator, such as watching the switchboard, filling sandbags, and doing tasks both related specifically to his communications responsibilities, as well as other tasks in maintaining the camp.

The claimant describes with some difficulty an incident in which he had shot and killed a Vietcong who had been shooting at him and other soldiers on patrol. After the claimant had shot and killed this Vietcong soldier, he found himself wanting to turn his weapon on a particular sergeant who was in his line of fire and kill him because this sergeant had threatened him earlier in the day. This incident still causes Mr. Kisor great distress when he thinks about it.

By the late 1980's Mr. Kisor states that he became aware that his war experiences were definitely having an impact on his life and his capacity to work. He went to a Veterans Outreach program sometime, he recalls, in approximately December of 1980. Around that time, he had been fired from the County road department. He notes that December is a difficult time for him because it is an anniversary reaction related to his experiences in Vietnam and the Harvest Moon operation.

So, the claimant went to the Veterans Outreach program and attended group therapy. He recalls going once a week from sometime in 1981 until perhaps August of 1984. He believes that he got a job sometime in August of 1984. The claimant remembers that he was anxious, on edge, and vigilant during this time period. He was also easily startled. He was not placed on medication. He found himself easily overwhelmed. He had trouble making simple decisions of living, such as getting out of bed, reading the paper, and making simple judgments. Prior to 1980, the claimant states that he had been able to keep his war experiences in Vietnam out of his conscious thinking.

At this time, the claimant states that he has become increasingly aware of the impact of his Vietnam experiences on his life. He talks with a fellow veteran, who he refers to as "[redacted]," on a frequent basis. He finds this helpful. He says, "We are like twins, in terms of our problems. Irritability, flying off the handle." The claimant denies drug use. He states that when he was in Vietnam, there were no drugs available to soldiers. Though initially the claimant denied dreaming about Vietnam, he acknowledged that he *did* dream about "enemy tanks...we are all killed." He pointed out the fact that there were no tanks in Vietnam. The claimant is vulnerable to flashbacks. He says anytime he hears about the war in Iraq, he feels they are "going through the same things we went through in Vietnam. Every time I hear about a fatality, I flashback to Vietnam." He states that his flashbacks can be "anywhere, anytime." The content of his flashbacks includes seeing people crawling, thinking about the sergeant that he almost shot and killed because he felt threatened by this sergeant, or wondering why he survived and didn't get shot. The claimant is aware that there were a number of occasions where he could have been captured. The claimant recalls with great distress and anguish a captain who threatened to kill

him because he was filling his canteen, and the captain felt the claimant was "following orders." The claimant notes in the last four years when he goes out into the country, he finds himself thinking about Vietnam because of the overgrowth of trees he sees, which reminds him of his experience in Vietnam. The claimant pointed out that my office also reminded him of Vietnam, because French doors, which were open at the time of our interview, clearly display a thick undergrowth and bamboo trees.

Mr. Kisor has had a gradual realization of the impact his war experiences have had on his personal and vocational life. He states when he worked for the road department, he liked being away from people. He liked working alone. The claimant states that when he goes into a restaurant, he needs to sit in a place where he can watch the door. He is aware that he feels numb emotionally. He notes that other people are happy, and he will try to appear as though he is doing okay, though he states that in fact, "I do not feel happy." The claimant acknowledges that is a loner. He said before he went in to the military, he liked to socialize and do things with other people; now, he and his wife do not socialize much. He does not like parties. He says, "I can't tell you why I don't like them." The claimant has an adult son and daughter, who live in Oregon. He says occasionally his son will drop in on him, though more often, he will see his son at his father-in-law's house. The claimant denies any church affiliation. He has a membership in a local Moose lodge, though he says he rarely attends. When he does, he talks only to a couple of people and tends to isolate himself. The claimant has few hobbies. He used to enjoy hunting and fishing. He does not want to do this anymore. The claimant states in the 1970's he was almost shot by a nephew, so he no longer likes to participate in this activity. Also in the 1970's, he was fishing and a barge "cut loose." He said, "We could have drowned." He felt a feeling of threat and has not fished in the last 27 years. The claimant does have a vintage model Chevy. Occasionally, he will attend a car show. He thinks the last one was approximately three years ago. He likes the activity and feels a certain anonymity, by being in a big crowd. The claimant states that he does not drink now. He notes that after some of the veterans' meetings that he was doing in the 1960's, he would drink until he was falling-down drunk, then he would drive home. He says he has probably not had any alcohol in the last 20 years.

DAILY ACTIVITIES:

The claimant describes his daily activities as follows. He gets up in the morning, sees his wife off to work. On Mondays, he will do the wash, clean the house, and mop the floors. He may pick up some scrap metal in the afternoon. He will get the mail. He watches TV and takes care of the yard. He will work on his truck. All his vehicles were acquired before 1974. He says if he's around the house, he usually doesn't leave the property. Stated differently, he said he wouldn't leave the property unless he had to. When he does have to go off the property, he tries to schedule his time away so he won't encounter crowds of people. He tries to do everything in the morning, his appointments with physicians he likes to have early in the morning so as to encounter the fewest people. The claimant states that he wakes up every hour or two, then goes back to bed for another hour or two sleep. Sometimes, he wakes up refreshed; sometimes, he wakes up tired. He says his energy is sometimes good. He says most of the time, he feels as if he is marking time, and said he's "waiting for the guy to take me." He states he has difficulty enjoying himself and feels grumpy 90 percent of the time. He acknowledges having had strong suicidal feelings and impulses on several occasions. When this was further discussed, he said that he had a "handle on it," with reference to these suicidal feelings.

SOCIAL HISTORY:

The claimant was born in Portland, Oregon, and grew up in and around Portland. When the claimant was at age five, the family moved to Beaverton. He graduated at Sunset High School in approximately 1962. He had a C average.

After the military service, the claimant had an A.A. in Applied Science, and he used the G.I. Bill to go through school.

He married in 1968. With regard to his wife and his marriage, he claims that he has been nasty and irritable to her, especially before he quit drinking alcohol. The claimant states that he does the housework, and he prepares his own food. He acknowledges that sometimes he is appropriate with his wife and other times he is verbally abusive. The claimant states that when he is not calm and mellow, he can be easily triggered. Anything the claimant perceives as a threat to him, that is from a car, walking on the street, he said he will "go off instantly, screaming and cursing" at the person he feels has threatened him or impinged on him. He states that he can't stand "boom boxes." The claimant has a married son, age 37, who lives in Scappoose, Oregon. His daughter is 36 years old, and lives approximately an hour's drive away. She has one son.

As mentioned earlier, the claimant has given up his hobbies of fishing and hunting. He does have a vintage Chevrolet, and has some occasional social activity around his car, though he said he last attended a formal car show three years ago.

MENTAL STATUS EXAMINATION:

The claimant flew to San Jose Airport, rented a car, and drove to Santa Cruz, where he was seen in my office for approximately a three-hour appointment. He was casually-dressed and well-groomed. He was somewhat balding. The claimant looked his stated age. He described himself as in excellent physical health. The claimant had some range of affect, and there was clear sadness as he described some of his war experiences. The claimant knew the current and previous presidents, going back to President Reagan. Short-term memory was impaired, as he recalled only three of six objects over a three-minute period. Judgment was tested and grossly intact, though there was some tendency to explain why people were required to have a driver's license in a concrete manner. For most of the interview, the claimant's affect was blunted, though as noted earlier, the claimant did show sadness when talking about war experiences. He was able to do simple calculations and multiplications within normal range. The claimant was able to describe the difference between a mistake and a lie, though he needed an example to do this. The claimant had difficulty explaining the difference between a child and a dwarf. The claimant had difficulty interpreting proverbs.

The claimant described sleep disturbance, with frequent awakening throughout the night. Energy was variable. The claimant described anhedonia or difficulty enjoying himself. He described irritability and moodiness, with respect to his wife. The claimant states that he is socially withdrawn, and is easily triggered when he feels there has been some type of threat made on him, whether it be him walking on the street or in the car. He described social

withdrawal, few friendships, limiting social activities to times when he will not be around crowds, and few social interactions with friends or family.

Prominent symptoms of post-traumatic stress are described. By way of summary, the claimant states that he is socially withdrawn. The claimant has blunted affect, and there is clear irritability, explosiveness, and verbal abuse to his wife and anyone who he feels threatens him. The claimant has dreams that reflect a sense of danger and threat, especially when these are "enemy tanks and we are all killed." Flashbacks can be triggered by hearing about the Iraq War in general, or the fatalities that are taking place there, in particular. He can have flashbacks anywhere and at any time. The claimant finds himself frequently ruminating about the war and certain circumstances of the war. These include: "see people crawling," wondering why he survived; not get shot; could have captured us...; the captain who threatened him, because he was drinking water; and the sergeant he wanted to shoot because he felt the sergeant had previously threatened his life. The claimant is also triggered when he is out in the country and he sees a lot of trees. The claimant has difficulty around December, because it reminds him of the Harvest Moon operation, by way of an anniversary reaction. An additional obvious post-traumatic component to the claimant's life is the fact that whenever he feels threatened, he responds explosively. This perceived threat runs throughout his history in many different forms, and the response of explosiveness is an attempt to create a feeling of power in a situation where he feels very helpless. The claimant also has insomnia, which is common in Post-traumatic Stress Disorder.

MEDICAL RECORDS REVIEW:

1. There is an undated typewritten note, apparently from the claimant, with a handwritten note underneath it. In the typewritten part, he states, "What I understood from talking with you on December 24, 1981, that every time I had something that I did not like happen to me in the Marines, I would throw it to the back of my mind, so that later on without understanding why, I would be defensive towards a woman or superintendent or anyone with the authority to boss. And that after a few years of this and the time spent in Nam, which these things were magnified more because everything was put in life-threatening to me, and the return of the U.S., even when things didn't go right, would build up until I would explode to the point of fighting if need be or overprotecting of those put in my care." Underneath it is a handwritten note from the claimant, and he states that he wrote this letter after the first time he went to a V.A. Outreach office and talking to the head doctor. He noted after the meetings that took place there, he would go out and get drunk.
2. There is a letter dated February 14, 1985, from a David E. Collier, M.S. Counselor, Portland Vet Center. In the letter, and I quote, he states, "Subsequent involvement in group and individual counseling identified additional concerns that Mr. Kisor had towards depression, suicidal thoughts, and social withdrawal. This symptomatic pattern has been associated with a diagnosis of P.T.S.D. (DSM III, 309.81).
3. There is an updated P.T.S.D. Disorder Questionnaire that is filled out and it is an excellent summary of the claimant's war experience, and I will have it Xeroxed and placed at the end of my report. It confirms the claimant's history to me of the two major battles he was in in Vietnam, that being combat operation Harvest Moon and, secondly, the battle at Chulai and Qui Nhon.

4. There is a report from social worker Arnie Chenifin, M.S.W., Clinical Social Worker, dated February 11, 1983. The social worker states, "Mrs. Kisor feels her husband can't stand the pressure of a job around other people. He was so hard to live with when he worked for the county road department. He seemed to bring all his problems home at night and she just couldn't handle it. He would blame her or tend to turn his feelings against her if something had happened during the day." He goes on to state, "He is much easier to live with since he has not been working, and has been more helpful also." In this report, Mr. Chenifin describes Mrs. Kisor saying that the claimant is "a loner, he tends to do better working as a loner, by himself."

   Under a section labeled "Medical," Mr. Chenifin notes that the claimant started drinking heavily on weekends after he returned home from Vietnam. He felt somewhat alienated from people. He couldn't seem to make friends without a lot of effort. He described graphically his fights on different jobs that he had. (The claimant has told me pointedly that these fights were verbal, not physical, at work.)

5. There is a psychiatric examination and Post-traumatic Stress Review dated March 2, 1983. Toward the end of the report, Dr. Henderson states a portion of the original dictation on this P.T. examination has been lost. The doctor goes on to state that he was able to recall enough information to render an opinion, as well as to recall what his diagnostic impression was at the time of the dictation. He said the review of symptoms related to the P.T.S. criteria was "not available, either in the report or in my memory. However, I do recall my distinct impression that this man suffers from a personality disorder, as opposed to P.T.S.D." Under his impression, he said that he felt the claimant suffered from an emotional disturbance and personality disorder related to issues of control and anger engendered when he feels that other people have power over him. He recalls that he was not impressed with the finding of P.T.S.D. His Axis I diagnosis was Intermittent Explosive Disorder, Axis II diagnosis Atypical Personality Disorder.

DIAGNOSIS:

DSM IV:

AXIS I

1. Post-Traumatic Stress Disorder, Chronic, 309.81
2. Alcoholic dependence, in remission.

AXIS II

No diagnosis.

AXIS III

1. The claimant describes good health and is being treated at Kaiser in Oregon.

AXIS IV

Psychosocial and Environmental Problems: The claimant has difficulty

deriving adequate support from his social environment, has no significant friendships outside his family. The claimant has had repeated vocational difficulties, based on his inability to manage authority. This is a problem stemming directly from his military service.

AXIS V

Global Assessment of Functioning Scale: GAF is 40. Mr. Kisor has major impairment in several areas, such as vocational, family relationships, and psychological functioning, based on symptoms consistent with Post-Traumatic Stress Disorder.

DISCUSSION OF DIAGNOSIS:

The diagnosis of Post-Traumatic Stress Disorder, Chronic, is indicated. There are four major criteria required for the diagnosis of Post-Traumatic Stress Disorder. The first is that the individual has been exposed to a traumatic event in which the following are present: 1) The person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury. 2) The person's response involved intense fear, helplessness, or horror. From my history, it is clear that the claimant was involved in two major campaigns in Vietnam in which his life was threatened, in which he witnessed deaths of fellow soldiers, and on one occasion in which he witnessed a civilian atrocity which was very upsetting to him. The claimant clearly experienced fear, helplessness, and horror at the events he encountered during Operation Harvest Moon and the fighting that took place in Qui Nhon. The claimant's history is consistent with the history that he presented in 1983 to Dr. Robin Henderson. Based on information Mr. Kisor provided me from the internet, I have written descriptions of Operation Harvest Moon, as well as the battle at Qui Nhon. It is clear that both of these battles took place and that there were many casualties on both sides.

Second diagnostic criteria ask that the traumatic event is persistently re-experienced in one or more of five possible ways. The claimant describes recurrent images of distressing recollections of the event, including images and perceptions. For example, the claimant is triggered when he is in the country, around trees. At times, he sees people crawling. At times, he remembers with great distress his impulse to shoot and kill the sergeant he felt had threatened his life. The claimant has recurrent distressing dreams that are thematically related to his war experiences. These themes have to do with tanks and people being killed. Even though there were no tanks in Vietnam, the subject matter of the dreams is clear and relates directly to his war experiences of overwhelming horror and death. The claimant has physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event. He is easily irritated or flies off the handle when he perceives threat. This happened in his former place of employment. It happens with his wife, and it can happen when he is in the car, or when he hears loud noise, such as "boom boxes." The claimant acknowledges that when he rages, he loses control, screaming and yelling and cursing loudly. And, lastly, the claimant has intense psychological distress at exposure to internal or external cues that symbolize the traumatic event. Specifically, the claimant finds himself triggered when he hears about details of the Iraq War on the media, and he is especially disturbed when he hears of an American fatality relating to the war.

The third area needed to diagnose Post-Traumatic Stress Disorder involves persistent avoidance of stimuli associated with the trauma, and numbing of general responsiveness, as indicated by three or more of the following symptom clusters. The claimant struggles to avoid thoughts, feelings, or conversations having to do with the trauma of war. Specifically, he is socially isolated, with few friends. He has quit hunting and fishing. Interestingly, both of these areas of his hobbies have been intruded upon by experiences that he felt in danger of his life. Simply put, the claimant has limited his life in many ways to attempt to avoid rekindling thoughts or associations related to war experiences. The claimant avoids activities, places, and people that arouse recollections of the trauma. This is one of the reasons the claimant is a loner and had difficulties while working under supervision in the labor force. The claimant has adjusted his entire life to avoid people and loud noises or startling experiences in social situations. The claimant has markedly diminished interest or participation in significant activities. As noted before, he has quit hunting and fishing. He rarely goes to the Moose Lodge. He has no significant friendships. He goes out in public only when he has the confidence that he will encounter very few people. The claimant clearly feels detached and estranged from others. He has difficulty enjoying himself. He recognizes that he has been emotionally abusive to his wife at times. The claimant has a restricted range of affect, as I've noted in my mental status examination, and his own self-report is that he feels numbed emotionally. He has intermittent symptoms of depression and at times has been suicidal.

The fourth area to be considered in diagnosing Post-Traumatic Stress Disorder has to do with "persistent symptoms of increased arousal, as indicated by two or more of the following." The claimant has persistent insomnia, waking up every hour or two. Episodes of irritability, outrage, and anger are frequently described, going back to the reports in my medical records review, as well as the self-reports at the time of this interview. The claimant acknowledges hyper-vigilance, and like many veterans, must sit in a restaurant where he can see the door. He has an exaggerated startle response, and this is one of the reasons he is so upset by loud noises and "boom boxes." The noise from those radios overwhelms his sensory barrier and causes him extreme difficulty, and he reacts with rage. This is an example in his life of an exaggerated startle response.

Mr. Kisor is symptomatic with regard to his P.T.S.D. and is easily triggered by events in the outside world. He has continued to circumscribe his social and vocational world so that he can feel safe and avoid the triggers that are so ubiquitous when he leaves the home. When working in the labor market, the claimant was re-traumatized in his contact with supervisors. I will address this issue in more detail in a subsequent paragraph. At times, Mr. Kisor has flashbacks and intrusive memories which disrupt his daily living and limit his willingness to enter friendships. Outside his family, Mr. Kisor has not developed any other significant friendships. He is socially withdrawn. Like many war veterans, Mr. Kisor is haunted by certain experiences and images from the war. During our interview, he asked about writing the sergeant that I referred to several times a letter in an attempt to tell him about his impulse to shoot the sergeant based on an earlier contact. I explained to Mr. Kisor that this was a matter to be resolved in counseling. The claimant has had difficulty in the open labor market with supervisors, in controlling his irritability and rage. I believe the adequate understanding of this difficulty since Vietnam was written very well by the claimant himself following a counseling session in

Record Before the 37 Agency (RBA)

December of 1981. This is in my medical records review, and I will refer to it in summary form here:

> "What I understood from talking with you on December 24, 1981, (was) that every time I had something that I did not like happen to me in the Marines, I would throw it to the back of my mind, so that later on without understanding why, I would be defensive to a foreman or superintendent or anyone with the authority to boss."

This one statement made by the claimant following a counseling session, where he had been helped to achieve insight into some of his personality dynamics, is very revealing. It should be remembered that the claimant often drank after counseling sessions at the V.A. and at one point got a D.U.I, which subsequently led him to discontinue drinking entirely. To summarize this, the claimant has modest resources in dealing with the overwhelming traumas that he experienced in Vietnam. he used the strategy of repression of all his feelings and memories until they erupted in or around 1980. At that point, he had difficulty dealing with his feelings, and became to self-medicate with alcohol. After several years of treatment, he left the V.A. center. However, the irritability, projection, and distortions that he acquired in dealing with the trauma of Vietnam have continued with him until this day. I believe, at best, Dr. Robin Henderson simply misunderstood the impact of the claimant's war trauma upon him, and this may have something to do with having lost a significant part of the original P.T.S.D. examination. As the doctor said specific review symptoms of P.T.S.D. criteria were not available in the report or in the memory of the physician. However, the doctor's report does clearly describe changes in the claimant's personality function, irritability, and explosive rage. The doctor's social worker, Mr. Chenifin makes it clear that the claimant was unable to stand the pressure of a job or be around people. He did much better when he was no longer working. Especially important in Mr. Chenifin's report is the notation that the claimant began heavy drinking when he returned from Vietnam. He was alienated from people. He couldn't seem to make friends. He got in fights at work. These symptoms described by the social worker seem, through the lens of the claimant's Post-Traumatic Stress Disorder, make it clear that the claimant was evincing symptoms of P.T.S.D. back in the 1980's. Stated simply, the claimant had irritability, difficulty managing his feelings, he felt alienated from people, and was unable to manage his feelings when they began to break through the repression that had kept him out of awareness for approximately 15 years. Further confirming this perspective is the letter dated February 14, 1983, from David E. Collier, M.S., Counselor at the Portland Vets Center. He said, "Subsequent involvement in group and individual counseling identified additional concerns that Mr. Kisor had towards depression, suicidal thoughts, and social withdrawal. This symptomatic pattern has been associated with a diagnosis of P.T.S.D." (Emphasis mine.)

In summary, the claimant's psychiatric record, as provided me, as well as my clinical interview with the claimant, are in complete accord with what the claimant is experiencing and has been experiencing the effects of chronic Post-Traumatic Stress Disorder for approximately the last 27 years. The claimant fulfills all four major criterion for the diagnosis of Post-Traumatic Stress Disorder. The claimant's symptoms are severe, and they have caused enormous distress in his personal life, have caused him to withdraw socially. He is alienated from friends and has a difficult relationship with his wife because of irritability and explosiveness. This symptom picture is common, in my experience, in individuals with chronic Post-Traumatic Stress Disorder.

TREATMENT INDICATED:

Mr. Kisor is in need of psychiatric treatment and support. He should be in counseling with an individual who understands the nature and fragility of an individual with chronic post-traumatic stress. Specifically, Mr. Kisor has limited psychological resources to deal with the trauma that he experienced in Vietnam. Following group therapy in the 1980's, the claimant would go out and drink alcohol. This reflects his inability to process or metabolize some of the material that was being brought to attention during the sessions. Mr. Kisor needs supportive psychotherapy. He should avoid any therapy which has to do with uncovering, as this will be re-traumatizing for him. The therapist needs to understand the claimant's psychological resources for dealing with his distress are limited and work carefully so that the claimant is not further traumatized or triggered by the therapeutic process itself. At times, the claimant experiences periods of depression and may be in need of psychiatric evaluation for an antidepressant. If the claimant becomes suicidal, special attention should be given him with regards to treatment and the possibility of antidepressants.

PERMANENT DISABILITY DETERMINATION:

Mr. Kisor has an ongoing, permanent psychological disability based on chronic Post-Traumatic Stress. His Post-Traumatic Stress Disorder continues to dramatically limit and circumscribe his circle of friends, his capacity to socialize with his family, and to participate in his community. The claimant has worked outside of formal employment since the 1980's, due to his conflicts with supervisors. As I have described elsewhere in this report, the claimant's difficulties with supervisors represents psychological displacement. Specifically, the claimant experienced several threatening situations from superiors while in Vietnam. He feared for his life in these circumstances. These experiences in Vietnam are reenacted when he feels threatened, especially by supervisors who may act in an unskillful way. As mentioned in the records review and elsewhere in this report, the claimant made a statement regarding this situation in December of 1981, which clearly described his tendency to displace or project onto authority figures unfinished emotional experience from his time in Vietnam. As a consequence of his difficulty with supervisors, the claimant has not been able to work in a formal vocational setting for over 20 years. He clearly has dramatic impairment in his capacity to work in the open labor market. It is my opinion that these impairments are a direct result of his war experiences in Vietnam and the subsequent disability that it has brought into his life.

In my clinical opinion, Mr. Kisor's Post-Traumatic Stress Disorder is severe, continual, and brings significant stress into his personal life. I have noted the enormous limitations it has placed on his work life. The claimant meets all four criteria for the diagnosis of a Post-Traumatic Stress Disorder. His history to me is consistent with the history he provided other examiners back in the 1980's, including social worker Chenifin and psychiatrist Robin Henderson. Dr. Henderson's report is most confusing, specifically on the page that is entitled "Addendum to Psychiatric and Post-Traumatic Stress Disorder Review." The doctor states that a portion of the original dictation on this P.T.S.D. examination has been lost, and then states, "Specific review of symptoms related to P.T.S.D. criteria was *not* available in either the report or my memory." The doctor then states that there is a recall that the claimant suffers from a Personality Disorder. As I have stated, I believe there has been a significant misunderstanding of the claimant's behavior,

in referring to it as a Personality Disorder. The claimant has projected his psychological distress onto a number of people in his environment, including supervisors and his wife. He has limited resources psychologically to deal with the stressors that he experienced as a combat veteran. These stressors have shown up in Post-Traumatic Stress and a tremendous deforming of his social and interpersonal world. Thus, the claimant has a Post-Traumatic Stress Disorder which is severe.

The claimant's history is consistent with his symptoms and the symptom severity is consistent with the report of his wife and the reports going back to the 1980's from Dr. Henderson and psychologist, Dr. Chenifin, as well as the counselor at the Vets Center, Mr. Collier, who noted the claimant's symptom pattern to be consistent with P.T.S.D. I have found nothing in the claimant's presentation, history, or records to suggest that he has misrepresented his military history, his symptoms, their severity, or the way in which they have manifested in his life, work, or family.

In summary, the claimant's reported symptoms are completely consistent with his history, the available medical records, and the known psychiatric literature for the presentation of Post-Traumatic Stress Disorder in one's life. It is not uncommon for war veterans to go years or decades before symptoms emerge. This is what took place when the claimant sought treatment in the early 1980's for his condition.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge. I will enclose a curriculum vitae to summarize my training and clinical experience.

Very truly yours,

Donald L. Davies, M.D.
Qualified Medical Examiner, 1996-August 2000

Dl.D/csd
Enclosures

DEPARTMENT OF VETERANS AFFAIRS
Portland VA Regional Office
1220 SW 3rd Ave
Portland Oregon
97204

JAMES L. KISOR

VA File Number

Represented by:
DISABLED AMERICAN VETERANS FHF DAV 9-19-07

Rating Decision
September 18, 2007

INTRODUCTION

The records reflect that you are a veteran of the Vietnam Era and Peacetime. You served in the Marine Corps from November 6, 1962 to November 4, 1966. We received a request to reopen a previous claim on June 5, 2006. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

Service connection for posttraumatic stress disorder is granted with an evaluation of 50 percent effective June 5, 2006.

EVIDENCE

- Claim received June 5, 2006.
- Posttraumatic stress disorder questionnaire.
- Service medical and administrative records for the period of November 6, 1962 to November 4, 1966.
- VCAA development letter dated September 15, 2006.

- Formal Finding of Information Required to Document the Claimed Stressor dated June 22, 2007.
- Medical records from the Portland Vet Center received July 3, 2007.
- Your statement dated August 24, 2007.
- Letter from Dr. Donald Davies dated July 20, 2007.
- VA examination dated September 5, 2007.
- Claims folder reviewed.

REASONS FOR DECISION

Service connection for posttraumatic stress disorder.

Your reopened service connected claim for posttraumatic stress disorder was received on June 5, 2006.

Since VA examination shows that you have been diagnosed with posttraumatic stress disorder due to your experiences that occurred in Vietnam and your service administrative records show that you are a combat veteran (Combat Action Ribbon recipient), service connection for posttraumatic stress disorder has been established as directly related to military service.

The above listed evidence has been received and reviewed. VA examination dated September 5, 2007 shows that you have been diagnosed with chronic and moderate posttraumatic stress disorder. The examination shows that you are married and occupationally retired. The examination shows that you are competent. The examination shows that you have had moderate social and occupational impairment. The examination shows irritability, disruption of attention and concentration, mild difficulties with motivation, mild suicidal ideation and reported difficulties falling and staying asleep. The examination shows no evidence of depression or any other coexisting mental health problems.

The VA examination and the evidence of record show that you warrant a 50 percent evaluation. An evaluation of 50 percent is assigned from June 5, 2006. An evaluation of 50 percent is assigned for occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships. A higher evaluation of 70 percent is not warranted unless there are deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of

personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships

Service connection for posttraumatic stress disorder is granted with an evaluation of 50 percent effective June 5, 2006; date of receipt of reopened claim.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

Rating Decision	*Department of Veterans Affairs* *Portland VA Regional Office*			Page 1 09/18/2007
NAME OF VETERAN JAMES L. KISOR	VA FILE NUMBER	SOCIAL SECURITY NO	POA DISABLED AMERICAN VETERANS	COPY TO

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
11/06/1962	11/04/1966	Marine Corps	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	2		None

JURISDICTION: Reopened Claim Received 06/05/2006

ASSOCIATED CLAIM(s): 024, Reopened Compensation, 06/05/06

SUBJECT TO COMPENSATION (1. SC)

9411 POSTTRAUMATIC STRESS DISORDER [PTSD/Medical/Veteran Evidence]
Service Connected, Vietnam Era, Incurred-COMBAT
50% from 06/05/2006

COMBINED EVALUATION FOR COMPENSATION:

50% from 06/05/2006

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSC Peacetime, Vietnam Era)

9499-9400 ATYPICAL PERSONALITY DISORDER
Not Service Connected, Constitutional/Developmental Abnormality

9499-9400 INTERMITTENT EXPLOSIVE DISORDER
Not Service Connected, Constitutional/Developmental Abnormality

Steve Book, Rating Specialist

Appx35

NOTICE OF DISAGREEMENT
&
REQUEST FOR DE NOVO DRO REVIEW

November 30, 2007

James L. Kisor
VA C#

Department of Veterans Affairs
Regional Office
Federal Building
1220 Southwest Third Avenue
Portland, OR 97204-2825

HAND DELIVERED

REFERENCE: 348/216/dmr

KISOR, James Lee

SUBJECT: NOTICE OF DISAGREEMENT concerning Portland VA Regional Office RATING BOARD decision dated Sept. 18, 2007

Dear Adjudication Section:

Please reference my continuing PTSD claim, concerning which I hereby file my NOTICE OF DISAGREEMENT ("NOD") and request for appellate review as concerns the Portland VA Regional Office Rating Board Decision dated September 18, 2007, and the VA award letter dated October 11, 2007, which conveyed that decision to me. I also hereby request a de novo review of the Rating Board Decision by a Decision Review Officer ("DRO") in conjunction with this NOTICE OF DISAGREEMENT.

As concerns my above now asserted NOD, please be advised that I disagree with all the adjudicative determinations mentioned in the above referenced VA Rating Board decision and letter and any enclosures thereto, except for those, if any, that I specifically state here that I do not want to appeal. Therefore, my notice of disagreement specifically covers all the determinations made by the regional office unless specifically excluded. I also disagree with the VARO failure to adjudicate issues and claims it was required to adjudicate. I am specifically referring to issues that I may not have discussed but which were reasonably raised by the evidence in my VA claims file or in the VA's possession that should have been inferred by the regional office. This appeal also includes adjudicative determinations that were mischaracterized by the regional office. If this appeal is not resolved favorably by my requested DRO review, or

RECEIVED
NOV 30 2007
VARO PORTLAND, OR
VET SERVICES CENTER

otherwise, please send me a Statement of the Case so that I may appeal this decision to the Board of Veterans Appeals.

Specifically, among other Rating Board errors, etc., this NOD disagrees with BOTH the 50% DISABILITY EVALUATION assigned and also the EFFECTIVE DATE assigned to my now service-connected PTSD.

1. **DISAGREEMENT WITH 50% PTSD DISABILITY EVALUATION ASSIGNED**: Since I left the Marine Corps and returned to civilian life, I have continuously suffered from severe employment problems caused by my PTSD, which are a matter of record in my VA file and were before the Rating Board. In that regard, it was CLEAR AND UNMISTAKABLE ERROR for the 1983 VA Rating Board to ignore the significance of the CLINICAL INTERVIEW and medical diagnosis of PTSD by psychiatrist Dr. Donald L. Davies, which appears in his psychiatric evaluation and PTSD diagnosis dated July 20, 2007, wherein he asserts that I have been suffering from the effects of chronic PTSD "for approximately the last 27 years." Dr. Davies also specifically noted, in part, the following in his findings and diagnosis:

> "The claimant fulfills all four major criterion for the diagnosis of Post-Traumatic Stress Disorder. The claimant's symptoms are severe, and they have caused enormous distress in his personal life, have caused him to withdraw socially. He is alienated from friends and has a difficult relationship with his wife because of irritability and explosiveness. This symptom picture is common, in my experience, in individuals with chronic Post-Traumatic Stress Disorder.
>
> . . . .
>
> The claimant has worked outside of formal employment since the 1980's, due to his conflicts with supervisors. As I have described elsewhere in this report, the claimant's difficulties with supervisions represents psychological displacement .
>
> . . . .
>
> Thus, the claimant has a Post-Traumatic Stress Disorder which is severe.

Perhaps most significant, is that the September 18, 2007, Rating Board, appears to have ignored the significance of the AXIS V finding, as follows:

> "**Gobal Assessment of Functioning Scale: GAF is 40**. Mr. Kisor has major impairment in several areas, such as vocational, family relationships, and psychological functioning, based on symptoms consistent with Post-Traumatic Stress Disorder."

There is overwhelming evidence of severe PTSD devastating my ability to work. Based upon my employment history records in my VA file and before the Rating Board which I cite as follows:

a. NATIONAL APPLICANCE COMPANY's two page letter dated August 3, 1973.
b. COLUMBIA COUNTY ROAD DEPARTMENT's two page letter dated June 5, 1979.

RECEIVED
NOV 30 2007
VARO PORTLAND, OR
VET SERVICES CENTER

c. COLUMBIA COUNTY BOARD OF COMMISSIONERS two page letter dated January 6, 1982.

d. Letter dated February 14, 1983, from David E. Collier, MS - Counselor for the Vet Center, which focuses, in part, on my continuous problem controlling anger and dealing with people in authority positions, which caused my decades long employment problems. I had weekly counseling sessions at the Vet Center for more than one year, which ultimately gave rise to Collier's letter linking my demonstrated symptoms with PTSD -- but ignored by the 1983 VA Rating Board

e. It has been my long time understanding that VA and the Social Security Administration(SSA) work closely together and exchange information -- such as my employment history revealed by taxed Social Security earnings. It is now my understanding that neither the 1983 PTSD VA Rating Board -- NOR -- the recent 2007 Rating Board, obtained from SSA my employment history from 1962 through 2003. Accordingly, I have obtained a copy and submit attached to this NOD and DRO review request, the SSA employment history BREAKDOWN. Please note the 16 years between 1967 which was the first year after I was separated from the Marine Corps, and my 1982 initial VA claim for VA PTSD --- which verifies my severe employment problems because of my severe PTSD during all of those years and continuously to date.

Based upon the evidence in the Record as a Whole; documented continuous severe employment problems at all times material 1966, to date; the psychiatric report and diagnosis by psychiatrist Dr. Davies, M.D., in particular my Global Assessment of Function ("GAF") score of 40, which indicates some impairment in reality testing or communication, or major impairment in several areas, such as work, school, family relations, judgment, thinking, or mood, the September 18, 2007, Rating Board clearly failed to understand the significance of my GAF score of 40. Significantly, a score of 31 to 40 indicates some impairment in reality testing or communication, or major impairment in several areas, such as work, school, family relations, judgment, thinking, or mood. The record clearly establishes my major impairment in attempted employment during the past 40 years.

2. <u>DISAGREEMENT WITH ASSIGNED EFECTIVE DATE OF JUNE 5, 2006</u>:

Based upon the RECORD AS A WHOLE, the September 18, 2007, Rating Board should have established the effective date of my PTSD claim as being: December 3, 1982, which is the date upon which I filed my original claim for service-connected PTSD disability compensation. It was CLEAR AND UNMISTAKABLE ERROR (CUE) for the Rating Board to have assigned the December 3, 1982, date of my original claim, for the following reasons:

a. When I and my witness first reviewed the VA file during 2006, we did so in order to determine if the VA had obtained my Marine Corps Service Record Book (SRB) from military records storage. In particular, we were searching for my Marine Corps record entitled "COMBAT HISTORY EXPEDITIONS AWARDS RECORD" which appears on the following military form: "NAVMC 118(9)-PD (EV. 11-55), and clearly reveals that I directly participated in "OPERATION HARVEST MOON" in Vietnam between Dec 9, 1965 through Dec 18, 1965. Significantly, that military record was NOT in my VA file concerning my first PTSD claim filed on December 3, 1982. Me and my witness have subsequently had occasion

RECEIVED
NOV 30 2007
VARO PORTLAND, OR
VET SERVICES CENTER

conversations with VA employees who asserted that my Marine Corps "Combat History" information, would NOT have been something which VA would have ordered from the record center concerning my 1982 PTSD claim. It was CUE for the 1983 Rating Board to have failed to obtain my USMC "Combat History" in response to my 1982 VA PTSD claim. Additionally, it was also CUE for the 2007 Rating Board to have failed to take into consideration that my 1982 PTSD claim was denied because the 1983 Rating Board failed to obtain my USMC "COMBAT HISTORY" concerning my specific claim for PTSD. Simply put: Had the 1983 Rating Board obtained my Marine Corps COMBAT HISTORY as they were required to do, it would have noted my involved on Operation Harvest Moon - - - which bloody operation is recognized by VA as being a major PTSD stressor.

It was also CUE for the 1983 Rating Board to have decided my 1982 PTSD claim, in light of the fact that Dr. Robin Henderson, M.D. emphasized the following in his: "ADDENDUM TO PSYCHIATRIC & POST TRAUMATIC STRESS DISORDER REVIEW" dated March 16, 1983:

> **"A portion of the original dictation on this PTSD examination has been lost"**

Significantly, VA Adjudication Officer H.L. Pfeiffer noted that serious problem, in his decision dated October 17, 1983. I also strongly otherwise strongly objected to Doctor R. Henderson's involvement in my PTSD evaluation, in my handwritten letter to the VA Regional Office dated August 31, 1983. Additionally, my then representative: DISABLED AMERICAN VETERANS, by its letter to the VA Regional Office, dated September 1, 1983, indicated, in part, the following:

> **" . . . the recent (2507) examination received at the VAMC Portland was cursory in nature and was not adequate in which to evaluate his claim. . . He has, therefore, requested that a re-evaluation of his condition and another examination be undertaken."**

The fact that VA Rating Board denied my PTSD claim on the bases of a psychiatric PTSD evaluation concerning which a portion had been lost, was both CUE and violated my right to Due Process of Law. The VA should have caused another psychiatric PTSD evaluation to have been scheduled, with a psychiatrist not hostile towards me and with an open mind. I was very troubled during Dr. Henderson's psychiatric evaluation, by the fact that he appeared to have no interest in my combat experiences in Vietnam, but only appeared to be interested in my childhood. It is also significant to note that Dr. Henderson's DIAGNOSIS of "ATYPICAL PERSONALITY DISORDER" and "INTERMITTENT EXPLOSIVE DISORDER" was not found by the 2 psychiatrist who psychiatrically evaluated me during 2007 concerning my recently granted PTSD claim.

3. **DISAGREEMENT WITH RATING BOARD FAILURE TO COMPLY WITH THE MANDATE OF 38 C.F.R. 4.16(b) AND ADJUDICATE REASONABLY RAISED CLAIM FOR TOTAL DISABILITY ON ACCOUNT OF INDIVIDUAL UNEMPLOYABILITY:**

RECEIVED
NOV 30 2007
VARO PORTLAND, OR
VET SERVICES CENTER

The VA Rating Board's 2007 decision failure to comply with the mandate of 38 CFR 4.16(b) which was reasonably raised by my decades (1967 to date) of documented continuous severe employment problems which are clearly evidenced in the record. In that regard, once the Rating Board assigned a 50% PTSD rating in its recent September 2007 Rating decision, it was thereby required in light of my decades of severe employment problems, to then give me "extraschedular consideration" concerning my claim for TOTAL DISABILITY ON ACCOUNT OF INDIVIDUAL UNEMPLOYABILITY which was more than reasonably raised by my employment history included in the Record before it. I hereby urge the DRO review officer, to immediately give me the extraschedular consideration for TDIU which is required by 38 C.F.R 4.16(b) in light of my severe inability because of my PTSD during the past 30 years since I left Vietnam and the Marine Corps, to have followed a substantially gainful occupation. The September 18, 2007 Rating Board made an ERROR by failing to give me the extraschedular consider for a TDIU rating, which my 3 decades of documented severe employment problems caused. Significantly, the copy of my Social Security EARNINGS during the past 40+ years -- between 1962 through 2002 -- verify my severe PTSD caused employment problems.

Because the record before the VA Regional Office, clearly reveals that during the past 40 years since I was separated from the Marine Corps, that I have been unable to secure and follow a substantially gainful occupation by reason of my service-connected PTSD disability which was erroneously rated at 50% in the September 18, 2007, Rating Decision, resulting in a failure to meet the 70% standard set forth in 38 CFR 4.16(a), the Rating Board decision dated September 18, 2007, mandated that I be given extraschedular consideration for a Total Disability on Account of Individual Unemployability (TDIU) rating -- see: 38 C.F.R. 4.16(b). My eligibility for TDIU was reasonably raised by the evidence in my VA claims file or in the VAs possession that should have been inferred by the regional office, but the vital question of TDIU was ignored by the September 18, 2007, VARO Rating Board Decision.

Please advise when the DRO review officer will conduct his or her review which I have hereby requested, in order that I can provide any additional information which I believe may be of additional help to that person, prior to a final DRO decision being made. Please also cause the DRO review officer to notify me concerning our having an informal telephone conference or face to face, in order to enable me to clarify any issues and facilitate the final decision re the DRO review request.

I HEREBY CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

Thank you.

Sincerely,

James L. Kisor

James L. Kisor
VA C# 23 71 [illegible]

RECEIVED
NOV 30 2007
VARO PORTLAND, OR
VET SERVICES CENTER

DEPARTMENT OF VETERANS AFFAIRS
Portland VA Regional Office
1220 SW Third Street
Portland, Oregon 97204

JAMES L. KISOR

VA File Number

Decision Review Officer Decision
March 25, 2009

INTRODUCTION

The records reflect that you are a veteran of the Vietnam Era and Peacetime. You served in the Marine Corps from November 6, 1962 to November 4, 1966. We received a Notice of Disagreement from you on November 30, 2007 about one or more of our earlier decisions. Based on a review of the evidence listed below, we have made the following decision(s) regarding your appeal. The issue remaining on appeal (regarding effective date for grant of service connection for post-traumatic stress disorder) will be addressed at a later date following a thirty(30) day period in which to provide you with an opportunity to submit additional evidence as was discussed during the informal conference of March 24, 2009. The thirty day period will end April 24, 2009.

DECISION

1 . Evaluation of posttraumatic stress disorder, which is currently 50 percent disabling, is increased to 70 percent effective June 5, 2006.

2 . Entitlement to individual unemployability is granted effective June 5, 2006.

\ppx41

EVIDENCE

- Statements(2) from veteran with copy of Service personnel record, DD Form 214, duplicate copy of Portland Vet Center statement of 2/14/83, all received 6/05/06
- Statement from veteran with attachments including copy of service personnel record, copy of citation for heroic participation in Operation Harvest Moon, in-service stressor information, all received 7/18/06
- VA letter to veteran dated 9/15/06 (VCAA)
- Copies of records from Navy Personnel Command indicating veteran was awarded a Combat Action Ribbon
- Statement from veteran with attachments including VCAA Notice Response and copy of USMC After Action Report for Operation Harvest Moon, all received 11/27/06
- Copy of article from Associated Press dated 1/07/07, copy of statement from David E. Collier MS of Portland Vet Center dated 2/14/83, received 2/06/07
- VA Memorandum dated 6/22/07 and Virtual VA documentation: Summary of Operation Harvest Moon
- Records from Portland Vet Center dated 12/28/81 to 8/27/85
- Statement from veteran dated 8/12/07 received 8/15/07
- Statement from veteran dated 8/24/07 with attached assessment by Donald L. Davies, M.D., dated 7/20/07 and additional attachments including copy of USMC After Action Report for Operation Harvest Moon, documentation showing receipt of Combat Action Ribbon, copy of correspondence to Dr. D. Scherf, all received 8/24/07
- Statements from veteran including that dated 2/02/07 and statements outlining stressful experiences in service, and articles submitted regarding post-traumatic stress disorder, all received
- Statement from Sharon Kisor, veteran's spouse, dated 1/14/07 and copy of USMC Certificate of Acceptance
- Various duplicate copies submitted 9/07/07
- VA examination report dated 9/05/07 from Portland VA Medical Center
- Rating Decision of 9/18/07 and all evidence identified therein with notification letter dated 10/11/07
- Statement from veteran dated 10/17/07 and VA Form 21-686c received 10/17/07
- Statement from veteran dated 11/26/07 and statement received 11/26/07
- VA letter to veteran dated 11/26/07
- Notice of Disagreement dated 11/30/07 with attached copy of Social Security Administration earnings summary, all received 11/30/07
- VA letter to veteran dated 12/13/07
- Statement from veteran dated 12/07/07 received 12/12/07
- VA letter to veteran dated 1/24/08
- Statement from veteran dated 2/02/08 received 2/06/08
- Statement from veteran dated 8/20/08 with attachment, received 8/22/08
- VA letter to veteran dated 2/19/09

- Statement from veteran dated 3/17/09 received 3/17/09
- Report of Contact dated 3/19/09
- VA Form 21-22a, VA Form 21-4138, VA Form 21-0589 all signed and dated 3/24/09 and prepared prior to informal conference of 3/24/09
- Statement from veteran dated 3/24/09 received 3/24/09
- Statement from veteran dated 3/24/09 with attached summary of employment history, received 3/24/09
- Informal Conference Report for informal conference conducted in lieu of formal hearing at veteran's request on 3/24/09
- Claims folder

REASONS FOR DECISION

1. Evaluation of posttraumatic stress disorder.

After consideration and review of the evidence of record (including VA examination findings of September 5, 2007, private assessment by Donald Davies dated July 20, 2007, Portland Vet Center records, statements provided by veteran and his spouse, and Informal Conference Report of March 24, 2009) the veteran's post-traumatic stress disorder is determined 70 percent disabling. The evidence of record reflects symptoms of recurrent explosive anger outbursts, daily intrusive thoughts, insomnia, chronic irritability, avoidance of triggers which remind him of Vietnam, suicidal ideation, anhedonia, social withdrawal and avoidance of people, and difficulty getting along with others and authority figures with history of recurrent verbal and physical altercations. The recent examination findings of September 5, 2007 assessed post-traumatic stress disorder in relation to the veteran's symptoms and did not identify any other coexisting mental problems. The assessment by Donald Davies also assessed post-traumatic stress disorder and did not identify any other coexisting mental problems. The Global Assessment of Functioning (GAF) score assigned by Donald Davies was 40, indicative of serious impairment in social and occupational functioning. Significant probative weight is given to the assessment by Donald Davies as this assessment was prepared after a comprehensive three hour interview and provides a detailed description as to veteran's occupational and social impairment over time and also provides detailed description as to impairment of veteran's disability on his marital and employment relationships.

Based on the evidence of record, a 70 percent disability evaluation is assigned. An evaluation of 70 percent is assigned whenever there is occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances

(including work or a worklike setting); inability to establish and maintain effective relationships.

A higher evaluation of 100 percent is not warranted unless there is total occupational and social impairment due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. This greater level of impairment is not effectively shown.

Given that there has been continual prosecution of this claim, the 70 percent disability evaluation is granted effective June 5, 2006 (date of receipt of reopened claim, pursuant to the historical practice of the Portland VA Regional Office to award compensation from date of receipt of reopened claim.) Given that there is indication that improvement may occur over time with ongoing treatment, this evaluation is not considered permanent at this time and is subject to a future review examination.

Note: As the veteran indicated that he would be satisfied with a 70 percent disability evaluation, this action is considered a complete grant of the benefit sought on appeal.

2. Entitlement to individual unemployability (inferred).

38 CFR 4.16 provides that individual unemployability may be granted where there is one service connected disability evaluated as 60 percent disabling, or two or more service connected disabilities, one of which is 40 percent disabling with a combined evaluation of 70 percent disability or more. The veteran's service connected disability of post-traumatic stress disorder is evaluated as 70 percent disabling and meets the minimum criteria for this benefit to apply. A review of the evidence of record (including private assessment of Donald Davies, Portland Vet Center records, VA examination findings and statements submitted by the veteran and on his behalf as well as the Informal Conference Report) shows that the veteran has symptoms involving recurrent episodes of explosive anger and difficulty getting along with others in positions of authority. The evidence reflects a history of problems of employment due to strained relations with supervisors and cowork[illegible] The evidence also reflects a history of verbal and physical altercations for which the veteran has later indicated an inability to control his actions and anger. The recent examination findings of September 5, 2007 assessed post-traumatic stress disorder in relation to the veteran's symptoms and did not identify any other coexisting mental problems. The assessment by Donald Davies also assessed post-traumatic stress disorder and did not identify any other coexisting mental problem. Based on the evidence of record, and giving significant probative weight to the assessment by Donald Davies, entitlement to individual unemployability is granted as the claimant is shown to be unable

to secure or follow a substantially gainful occupation as a result of service-connected disabilities.

Entitlement to individual unemployability is granted because the claimant is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.

Note: As the benefit sought has been granted, this action is determined to fully resolve this issue.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

Rating Decision	Department of Veterans Affairs Portland VA Regional Office			Page 1 03/27/2009
NAME OF VETERAN JAMES L. KISOR	VA FILE NUMBER	SOCIAL SECURITY NR	POA	COPY TO

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
11/06/1962	11/04/1966	Marine Corps	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	2		0412

JURISDICTION: Notice of Disagreement Received 11/30/2007

ASSOCIATED CLAIM(s): 174; DRO Decision; 03/24/09

SUBJECT TO COMPENSATION (1. SC)

9411 POSTTRAUMATIC STRESS DISORDER [PTSD/Medical/Veteran Evidence]
Service Connected, Vietnam Era, Incurred-COMBAT
Future Exam April 2012
70% from 06/05/2006

COMBINED EVALUATION FOR COMPENSATION:

70% from 06/05/2006
Individual Unemployability Granted from June 5, 2006

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSC Peacetime, Vietnam Era)

9499-9400 INTERMITTENT EXPLOSIVE DISORDER
Not Service Connected, Constitutional/Developmental Abnormality

9499-9400 ATYPICAL PERSONALITY DISORDER
Not Service Connected, Constitutional/Developmental Abnormality

Decision Review Officer-348/218/DKK

DEPARTMENT OF VETERANS AFFAIRS
Portland Regional Office
1220 SW 3RD AVE
PORTLAND OR 97204

January 14, 2010

JAMES L. KISOR

In Reply Refer To:
348/218/srh
C
JAMES L. KISOR

Dear Mr. Kisor:

You have filed a Notice of Disagreement with our action. This is the first step in appealing to the Board of Veterans' Appeals (BVA). This letter and enclosures contain very important information concerning your appeal.

Statement of the Case

We have enclosed a Statement of the Case, a summary of the law and evidence concerning your claim. This summary will help you to make the best argument to the BVA on why you think our decision should be changed.

What You Need To Do

To complete your appeal, you must file a formal appeal. We have enclosed VA Form 9, Appeal to the Board of Veterans' Appeals, which you may use to complete your appeal. We will gladly explain the form if you have questions. Your appeal should address:

- the benefit you want
- the facts in the Statement of the Case with which you disagree; and
- the errors that you believe we made in applying the law.

When You Need To Do It

You must file your appeal with this office within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action that you have appealed. **If we do not hear from you within this period, we will close your case.** If you need more time to file your appeal, you should request more time before the time limit for filing your appeal expires. See item 5 of the instructions in VA Form 9, Appeal to Board of Veterans' Appeals.

T174
SRH

Appx51

Hearings

You may have a hearing before we send your case to the BVA. If you tell us that you want a hearing, we will arrange a time and a place for the hearing. VA will provide the hearing room, the hearing official, and a transcript of the hearing for the record. VA cannot pay any other expenses of the hearing. You may also have a hearing before the BVA, as noted on the enclosed VA Form 9, Appeal to the Board of Veterans' Appeals. **Do not delay filing your appeal if you request a hearing. Your request for a hearing does not extend the time to file your appeal.**

Representation

If you do not have a representative, it is not too late to choose one. An accredited representative of a recognized service organization may represent you in your claim for VA benefits without charge. An accredited attorney or an accredited agent may also represent you before VA, and may charge you a fee for services performed after the filing of a notice of disagreement. In certain cases, VA will pay your accredited agent or attorney directly from your past due benefits. For more information on the accreditation process and fee agreements (including filing requirements), you and/or your representative should review 38 U.S.C. § 5904 and 38 C.F.R. § 14.636 and VA's website at http://www.va.gov/ogc/accreditation.asp. You can also find the names of accredited attorneys, agents and service organization representatives on this website.

What We Will Do

After we receive your appeal, we will send your case to the BVA in Washington, DC for a decision. The BVA will base its decision on an independent review of the entire record, including the transcript of the hearing, if you have a hearing.

Sincerely yours,

K. Kalama

K. Kalama
Service Center Manager

Enclosure(s): VA Form 9
Formal Hearing Transcript dated October 14, 2009

Statement of the Case	*Department of Veterans Affairs* *Portland Regional Office*		Page 1 01/14/2010
NAME OF VETERAN JAMES L. KISOR	VA FILE NUMBER C	SOCIAL SECURITY NO. [illegible]	POA

ISSUE:

Entitlement to an effective date of December 3, 1982 for the grant of service connection for post traumatic stress disorder.

EVIDENCE:

- Rating Decision of September 18, 2007 and all evidence identified therein
- Decision review Officer Decision dated March 25, 2009 and all the evidence contained therein
- Informal Conference Report for informal conference conducted in lieu of formal hearing at veteran's request on March 24, 2009
- Rating Decision dated May 9, 1983 and all the evidence used in the decision.
- Notice of Disagreement received from the veteran on June 6, 1983
- Statement of the Case issued June 14, 1983
- Letter from the veteran requesting a 90 day extension to submit the VA Form 9 received August 9, 1983
- VA letter dated August 19, 1983 granting a 60 day extension for submittal of the VA Form 9
- Letter from the veteran indicating he believed the VA examination conducted March 2, 1983 and signed March 23, 1983 was inadequate for rating purposes received September 6, 1983
- VA Rating Decision dated October 11, 1983 indicating after review of the VA examination results no new examination is warranted
- VA Letter to the veteran dated October 17, 1983
- Letter from the veteran received December 12, 2007
- Letter from the veteran received February 6, 2008
- Letter from the veteran received August 22, 2008 with a U.S. Court of Appeals Decision
- Letter from the veteran received March 17, 2009
- Correspondence from Philip Cushman received March 24, 2009
- Employment information from the veteran received March 24, 2009
- Correspondence received from the veteran with Court documents received April 27, 2009
- Correspondence received from the veteran with packet of information received October 14, 2009
- Letter from the veteran received October 15, 2009
- Letter from the veteran dated October 19, 2009
- Formal Hearing Transcript conducted on October 14, 2009

ADJUDICATIVE ACTIONS:

06-05-2006	Claim received.
09-18-2007	Claim considered based on all the evidence of record.
10-11-2007	Claimant notified of decision.

11-30-2007 Notice of Disagreement received.

11-30-2007 De Novo Review election received from appellant.

01-14-2010 De Novo Review performed based on all the evidence of record.

PERTINENT LAWS; REGULATIONS; RATING SCHEDULE PROVISIONS:

Unless otherwise indicated, the symbol "§" denotes a section from title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits.

§3.102 (New) Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships. (Authority: 38 U.S.C. 501(a))

§3.159 (05/08) Department of Veterans Affairs assistance in developing claims.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who

has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) Substantially complete application means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(4) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) Information means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to notify claimants of necessary information or evidence. (1) When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the "notice"). In the notice VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice. If the claimant has not responded to the notice within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the notice, VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information.

(Authority: 38 U.S.C. 5102(b), 5103A(3))

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a Notice of Disagreement; or

(ii) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

(c) VA's duty to assist claimants in obtaining evidence. Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A(b))

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough

information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions. (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §3.309, §3.313, §3.316, and §3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) Paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured.

(Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance. VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) Duty to notify claimant of inability to obtain records. (1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If

the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a))

(g) The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations.

(Authority: 38 U.S.C. 5103A(g))

§3.2600 Review of benefit claims decisions.

(a) A claimant who has filed a timely Notice of Disagreement with a decision of an agency of original jurisdiction on a benefit claim has a right to a review of that decision under this section. The review will be conducted by an Adjudication Officer, Veterans Service Center Manager, or Decision Review Officer, at VA's discretion. An individual who did not participate in the decision being reviewed will conduct this review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.

(b) Unless the claimant has requested review under this section with his or her Notice of Disagreement, VA will, upon receipt of the Notice of Disagreement, notify the claimant in writing of his or her right to a review under this section. To obtain such a review, the claimant must request it not later than 60 days after the date VA mails the notice. This 60-day time limit may not be extended. If the claimant fails to request review under this section not later than 60 days after the date VA mails the notice, VA will proceed with the traditional appellate process by issuing a Statement of the Case. A claimant may not have more than one review under this section of the same decision

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under §3.103(c).

(d) The reviewer may grant a benefit sought in the claim notwithstanding §3.105(b), but, except as provided in paragraph (e) of this section, may not revise the decision in a manner that is less advantageous to the claimant than the decision under review. A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

(e) Notwithstanding any other provisions of this section, the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see §3.105(a)).

(f) Review under this section does not limit the appeal rights of a claimant. Unless a claimant withdraws his or her Notice of Disagreement as a result of this review process, VA will proceed with the traditional appellate process by issuing a Statement of the Case.

(g) This section applies to all claims in which a Notice of Disagreement is filed on or after June 1, 2001. (Authority: 38 U.S.C. 5109A and 7105(d))

§3.114 (New) Change of law or Department of Veterans Affairs issue.

(a) Effective date of award. Where pension, compensation, dependency and indemnity compensation, or the monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue. Where pension, compensation, dependency and indemnity compensation, or the monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida who is a child of a Vietnam veteran is awarded or increased pursuant to a liberalizing law or VA issue which became effective on or after the date of its enactment or issuance, in order for a claimant to be eligible for a retroactive payment under the provisions of this paragraph the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement. The provisions of this paragraph are applicable to original and reopened claims as well as claims for increase.

(1) If a claim is reviewed on the initiative of VA within 1 year from the effective date of the law or VA issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or VA issue.

(2) If a claim is reviewed on the initiative of VA more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of administrative determination of entitlement.

(3) If a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request. (Authority: 38 U.S.C. 1806, 5110(g))

(b) Discontinuance of benefits. Where the reduction or discontinuance of an award is in order because of a change in law or a Department of Veterans Affairs issue, or because of a change in interpretation of a law or Department of Veterans Affairs issue, the payee will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence. If additional evidence is not received within that period, the award will be reduced or discontinued effective the last day of the month in which the 60-day period expired. (Authority: 38 U.S.C. 5112(b)(6))

§3.151 Claims for disability benefits.

(a) General. A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. (38 U.S.C. 5101(a)). A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit.

(b) Retroactive disability pension claims. Where disability pension entitlement is established based on a claim received by VA on or after October 1, 1984, the pension award may not be effective prior to the date of receipt of the pension claim unless the veteran specifically claims entitlement to retroactive benefits. The claim for retroactivity may be filed separately or included in the claim for disability pension, but it must be received by VA within one year from the date on which the veteran became permanently and totally disabled. Additional requirements for entitlement to a retroactive pension award are contained in §3.400(b) of this part. (Authority: 38 U.S.C. 5110(b)(3))

§3.155 Informal claims.

(a) Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not sui juris may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

(b) A communication received from a service organization, an attorney, or agent may not be accepted as an informal claim if a power of attorney was not executed at the time the communication was written.

(c) When a claim has been filed which meets the requirements of §3.151 or §3.152, an informal request for increase or reopening will be accepted as a claim.

§3.157 Report of examination or hospitalization as claim for increase or to reopen.

(a) General. Effective date of pension or compensation benefits, if otherwise in order, will be the date of receipt of a claim or the date when entitlement arose, whichever is the later. A report of examination or hospitalization which meets the requirements of this section will be accepted as an informal claim for benefits under an existing law or for benefits under a liberalizing law or Department of Veterans Affairs issue, if the report relates to a disability which may establish entitlement. Acceptance of a report of examination or treatment as a claim for increase or to reopen is subject to the requirements of §3.114 with respect to action on Department of Veterans Affairs initiative or at the request of the claimant and the payment of retroactive benefits from the date of the report or for a period of 1 year prior to the date of receipt of the report. (Authority: 38 U.S.C. 5110(a))

(b) Claim. Once a formal claim for pension or compensation has been allowed or a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree, receipt of one of the following will be accepted as an informal claim for increased benefits or an informal claim to reopen. In addition, receipt of one of the following will be accepted as an informal claim in the case of a retired member of a uniformed service whose formal claim for pension or compensation has been disallowed because of receipt of retirement pay. The evidence listed will also be accepted as an informal claim for pension previously denied for the reason the disability was not permanently and totally disabling.

(1) Report of examination or hospitalization by Department of Veterans Affairs or uniformed services. The date of outpatient or hospital examination or date of admission to a VA or uniformed services hospital will be accepted as the date of receipt of a claim. The date of a uniformed service examination which is the basis for granting severance pay to a former member of the Armed Forces on the temporary disability retired list will be accepted as the date of receipt of claim. The date of admission to a non-VA hospital where a veteran was maintained at VA expense will be accepted as the date of receipt of a claim, if VA maintenance was previously authorized; but if VA maintenance was authorized subsequent to admission, the date VA received notice of admission will be accepted. The provisions of this paragraph apply only when such reports relate to examination or treatment of a disability for which service-connection has previously been established or when a claim specifying the benefit sought is received within one year from the date of such examination, treatment or hospital admission. (Authority: 38 U.S.C. 501(a))

(2) Evidence from a private physician or layman. The date of receipt of such evidence will be accepted when the evidence furnished by or in behalf of the claimant is within the competence of the physician or lay person and shows the reasonable probability of entitlement to benefits.

(3) State and other institutions. When submitted by or on behalf of the veteran and entitlement is shown, date of receipt by the Department of Veterans Affairs of examination reports, clinical records, and transcripts of records will be accepted as the date of receipt of a claim if received from State, county, municipal, recognized private institutions, or other Government hospitals (except those described in paragraph (b)(1) of this section). These records must be authenticated by an appropriate official of the institution. Benefits will be granted if the records are adequate for rating purposes; otherwise findings will be verified by official examination. Reports received from private institutions not listed by the American Hospital Association must be certified by the Chief Medical Officer of the Department of Veterans Affairs or physician designee.

§3.160 Status of claims.

The following definitions are applicable to claims for pension, compensation, and dependency and indemnity compensation.

(a) Informal claim. See §3.155.

(b) Original claim. An initial formal application on a form prescribed by the Secretary. (See §§3.151, 3.152).

(c) Pending claim. An application, formal or informal, which has not been finally adjudicated.

(d) Finally adjudicated claim. An application, formal or informal, which has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of 1 year after the date of notice of an award or disallowance, or by denial on appellate review, whichever is the earlier. (See §§20.1103 and 20.1104 of this chapter.)

(e) Reopened claim. Any application for a benefit received after final disallowance of an earlier claim, or any application based on additional evidence or a request for a personal hearing submitted more than 90 days following notification to the appellant of the certification of an appeal and transfer of applicable records to the Board of Veterans Appeals which was not considered by the Board in its decision and was referred to the agency of original jurisdiction for consideration as provided in §20.1304(b)(1) of this chapter. (Authority: 38 U.S.C. 501(a))

(f) Claim for increase. Any application for an increase in rate of a benefit being paid under a current award, or for resumption of payments previously discontinued.

§3.400(b)2 General. Disability Compensation.

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later. (Authority: 38 U.S.C. 5110(a))

(b) Disability benefits:

(2) Disability compensation:

(i) Direct service connection (§3.4(b)). Day following separation from active service or date entitlement arose if claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later. Separation from service means separation under conditions other than dishonorable from continuous active service which extended from the date the disability was incurred or aggravated.

(ii) Presumptive service connection (§§3.307, 3.308, 3.309). Date entitlement arose, if claim is received within 1 year after separation from active duty; otherwise date of receipt of claim, or date entitlement arose, whichever is later. Where the requirements for service connection are met during service, the effective date will be the day following separation from service if there was continuous active service following the period of service on which the presumption is based and a claim is received within 1 year after separation from active duty

DECISION:

Entitlement to an earlier effective date of December 3, 1982 for the grant of service connection for post traumatic stress disorder is not established.

REASONS AND BASES:

Service connection for post traumatic stress disorder was granted effective June 5, 2006, the date of receipt of the veteran's reopened claim. The veteran provided a Notice of Disagreement with the effective date and indicated that the effective date should be December 3, 1982, the date of his original claim for service connection for post traumatic stress disorder.

The veteran indicated that the VA made Clear and Unmistakable errors in the decision dated May 9, 1983. The veteran indicated that VA erred in not obtaining his personnel records; not scheduling another examination when portions of his original examination was missing; and that his post traumatic stress disorder prevented him from properly handling his claim in 1983. The veteran has also indicated that the VA has purposely removed evidence from his claims file to sabotage his claim.

The veteran stated that the VA erred in not obtaining his personnel records when he filed his original claim for benefits, and if the VA obtained the records then he believes his stressors would

Statement of the Case	*Department of Veterans Affairs* *Portland Regional Office*		Page 13 01/14/2010
NAME OF VETERAN JAMES L. KISOR	VA FILE NUMBER C	SOCIAL SECURITY NR	POA

have been verified and service connection granted. The reason the veteran's claim was denied by Rating Decision dated May 9, 1983 was not due to inadequate stressor information but due to the absence of a clinical diagnosis of post traumatic stress disorder. The examiner diagnosed the veteran with intermittent explosive disorder and atypical personality disorder. At the time of the decision the veteran did not have a clinical diagnosis of post traumatic stress disorder.

The veteran has subsequently indicated that the VA has tried to sabotage his claim and removed his personnel records from his claims file. The veteran indicated that his service records were obtained in support of his claim however his personnel records were missing from his claims file. The VA requested the veteran's service treatment records on January 11, 1983 and received them on May 2, 1983. The VA never requested the veteran's personnel records until November 29, 2006. The records were requested in support of his reopened post traumatic stress disorder claim.

The veteran stated that the VA erred in not scheduling another examination after it was found that part of the examination dictation was missing. The examiner indicated that although part of the dictation was missing he was able to recall enough information to render an opinion and to recall his diagnostic impression at the time of the dictation. The veteran submitted a letter after receipt of the Rating Decision and requested another examination due to perceived inaccuracies in the examination and due to the fact that the examiner lost part of the examination. His request generated another Rating Decision which indicated that the examination was not inadequate, and the prior denial was upheld.

The veteran indicated that due to his post traumatic stress disorder he was unable to properly handle his claim in 1983. The records note that the veteran filed an appeal with the initial denial of post traumatic stress disorder. Once he received the Statement of the Case, he had the wherewithal to request a 90 extension in order to obtain supporting evidence for his claim. The veteran did submit a rebuttal letter in regards to the VA examination results, however a VA form 9 was never received from the veteran to perfect his appeal. The evidence of record does not indicate that his undiagnosed post traumatic stress disorder prevented him from pursuing his compensation claim.

The evidence of record fails to establish that an earlier effective date of December 3, 1982 is warranted in this case. The effective date of June 5, 2006 is continued.

PREPARED BY

S. Hinds, Decision Review Officer

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR PETITIONER

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW J. PINCUS
CHARLES A. ROTHFELD
E. BRANTLEY WEBB
ANDREW A. LYONS-BERG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Petitioner

QUESTION PRESENTED

Whether the Court should overrule *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

TABLE OF CONTENTS

Question Presented i
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Regulation Involved 1
Introduction 3
Statement 6
A. Legal background. 6
1. *Seminole Rock* and *Auer*. 6
2. The Veterans Affairs regulations. 10
B. Factual background. 13
C. Proceedings below 15
Summary of Argument 21
Argument 25
I. *Seminole Rock* and *Auer* are wrong 25
A. *Auer* deference is inconsistent with the APA. 26
1. *Auer* deference circumvents the APA's safeguards governing agency rulemaking. 26
2. *Auer* exceeds the scope of any congressional delegation of lawmaking authority 33
B. *Auer* injects intolerable unpredictability into agency action. 36
1. *Auer* invites vague regulations, which limit the public's ability to conform conduct to law 37
2. *Auer* deference is especially suspect when the agency is self-interested. 40

3. There is no policy-based justification for *Auer* deference. 41
C. *Auer* deference is inconsistent with separation-of-powers principles. 43
D. *Chevron* deference confirms the flaws of *Auer* deference. 45
II. *Stare decisis* does not require the Court to retain *Seminole Rock* and *Auer*. 47
A. Special justifications warrant overruling *Seminole Rock* and *Auer*. 47
B. *Stare decisis* applies with less force to judicially-created interpretive principles. 48
C. Private reliance interests favor overruling *Seminole Rock* and *Auer*. 51
D. The administrative state has evolved substantially since 1945. 53
III. Section 3.156(c) entitles petitioner to retroactive benefits. 55
Conclusion 61

TABLE OF AUTHORITIES

Page(s)

Cases

Alleyne v. *United States*,
570 U.S. 99 (2013) 49

Appalachian Power Co., v. *EPA*,
208 F.3d 1015 (D.C. Cir. 2000) 54

Auer v. *Robbins*,
519 U.S. 452 (1997) ..... *passim*

Boone v. *Lightner*,
319 U.S. 561 (1943) 60

Bowles v. *Seminole Rock & Sand Co.*,
325 U.S. 410 (1945 ..... 3, 6

Bruesewitz v. *Wyeth LLC*,
562 U.S. 223 (2011) 42

Chase Bank USA, N.A. v. *McCoy*,
562 U.S. 195 (2011) 9

Chevron, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*,
467 U.S. 837 (1984) ..... *passim*

Chickaloon-Moose Creek Native Ass'n, Inc. v. *Norton*,
360 F.3d 972 (9th Cir. 2004) 40

Christopher v. *SmithKline Beecham Corp.*,
567 U.S. 142 (2012) 10, 37

Chrysler Corp. v. *Brown*,
441 U.S. 281 (1979) 28, 29, 33

City of Arlington v. *FCC*,
569 U.S. 290 (2013) ..... *passim*

Cases—continued

Coeur Alaska, Inc. v. *Southeast Alaska Conservation Council*, 557 U.S. 261 (2009) 9, 29, 32, 51

Crawford v. *Washington*, 541 U.S. 36 (2004) 48

Decker v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597 (2013) ..... *passim*

Ehlert v. *United States*, 402 U.S. 99 (1971) 8

Encino Motorcars, LLC v. *Navarro*, 136 S. Ct. 2117 (2016) 29, 30, 33, 35

FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) 30

Free Enterprise Fund v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) 54

Garco Constr., Inc. v. *Speer*, 138 S. Ct. 1052 (2018) 29, 52

Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) 9

Gloucester Cty. Sch. Bd. v. *G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017 39

Gonzales v. *Oregon*, 546 U.S. 243 (2006) 9, 10

G.G. ex rel. Grimm v. *Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) 39

Henderson v. *Shinseki*, 562 U.S. 428 (2011) 60

Hodge v. *West*, 155 F.3d 1356 (Fed. Cir. 1998) 60

Cases—continued

INS v. *Chadha*,
462 U.S. 919 (1983) 45, 53

INS v. *Stanisic*,
395 U.S. 62 (1969) 8

Johnson v. *Robison*,
415 U.S. 361 (1974) 60

Kennedy v. *Plan Adm'r for DuPont Sav. & Inv. Plan*,
555 U.S. 285 (2009) 9, 30, 31

Lawrence v. *Texas*,
539 U.S. 558 (2003) 51, 53

Long Island Care at Home, Ltd. v. *Coke*,
551 U.S. 158 (2007) 9, 30, 31, 51

Lyng v. *Payne*,
476 U.S. 926 (1986) 8

Martin v. *Occupational Safety & Health Review Comm'n*,
499 U.S. 144 (1991) 4, 34, 41

Mastrobuono v. *Shearson Lehman Hutton, Inc.*,
514 U.S. 52 (1995) 60

Metropolitan Wash. Airports Auth. v. *Citizens for Abatement of Aircraft Noise, Inc.*,
501 U.S. 252 (1991) 45

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 28, 30

National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*,
545 U.S. 967 (2005) 33

Cases—continued

National Family Planning & Reprod. Health Ass'n, Inc. v. *Sullivan*,
979 F.2d 227 (D.C. Cir. 1992) 36

National Fuel Gas Supply Corp. v. *FERC*,
811 F.2d 1563 (D.C. Cir. 1987) 40

North Carolina Growers' Ass'n, Inc. v. *United Farm Workers*,
702 F.3d 755 (4th Cir. 2012) 39, 52

Patterson v. *McLean Credit Union*,
491 U.S. 164 (1989) 47, 48

Payne v. *Tennessee*,
501 U.S. 808 (1991) 47, 49

Pearson v. *Callahan*,
555 U.S. 223 (2009) 47, 48, 49, 51

Perez v. *Mortgage Bankers Ass'n*,
135 S. Ct. 1199 (2015) ..... *passim*

PLIVA, Inc. v. *Mensing*,
564 U.S. 604 (2011) 9

Reno v. *Bossier Par. Sch. Bd.*,
520 U.S. 471 (1997) 42

Robertson v. *Methow Valley Citizens Council*,
490 U.S. 332 (1989) 8

Rust v. *Sullivan*,
500 U.S. 173 (1991) 45

Saucier v. *Katz*,
533 U.S. 194 (2001) 49

Shalala v. *Guernsey Mem'l Hosp.*,
514 U.S. 87 (1995) 31, 33

Skidmore v. *Swift & Co.*,
323 U.S. 134 (1944) 7, 43

Cases—continued

Smiley v. *Citibank (S.D.), N.A.*,
517 U.S. 735 (1996) 29

South Dakota v. *Wayfair, Inc.*,
138 S. Ct. 2080 (2018) 47, 51, 52, 53

Southern Goods Corp. v. *Bowles*,
158 F.2d 587 (4th Cir. 1946) 7

Stinson v. *United States*,
508 U.S. 36 (1993) 8

Talk Am., Inc. v. *Michigan Bell Tel. Co.*,
564 U.S. 50 (2011) 37, 38, 45, 53

Thomas Jefferson Univ. v. *Shalala*,
512 U.S. 504 (1994) 8, 37, 41, 43

Thorpe v. *Housing Auth. of City of Durham*,
393 U.S. 268 (1969) 7, 29, 51

Udall v. *Tallman*,
380 U.S. 1 (1965) 7

United States v. *Gaudin*,
515 U.S. 506 (1995) 49

United States v. *Larionoff*,
431 U.S. 864 (1977) 8

United States v. *Mead Corp.*,
533 U.S. 218 (2001) ..... *passim*

United States v. *Morton Salt Co.*,
338 U.S. 632 (1950) 26, 28

United States v. *Price*,
361 U.S. 304 (1960) 42

United States v. *Seckinger*,
397 U.S. 203 (1970) 61

United States v. *Swank*,
451 U.S. 571 (1981) 8

Cases—continued

Williamson v. *Mazda Motor of Am., Inc.*,
562 U.S. 323 (2011) 9

Wisconsin Cent. Ltd. v. *United States*,
138 S. Ct. 2067 (2018) 58

Zivotofsky ex rel. Zivotofsky v. *Clinton*,
566 U.S. 189 (2012) 55

Statutes, Rules, and Regulations

5 U.S.C.
§ 553 ..... 28, 36
§ 553(b)(A) 31
§ 553(c) 28
§ 706 27
§ 706(2)(A) 29

28 U.S.C. § 1254(1) 1

38 U.S.C.
§ 501(a)(1) 10, 35
§ 1110 10
§ 1131 10
§ 5103A 11, 12, 59
§ 7292 27

38 C.F.R.
§ 3.4 11
§ 3.156(a) ..... *passim*
§ 3.156(c) ..... *passim*
§ 3.156(c)(1) ..... *passim*
§ 3.156(c)(1)(i) 19, 57
§ 3.159(c) 12
§ 3.304(f) 11, 57

Statutes, Rules, and Regulations—continued

Fed. R. Evid. 401 57

Pub. L. No. 77-421, 56 Stat. 23 (1942) 53

Pub. L. No. 106-475, 114 Stat. 2096 (2000) 59

Other Authorities

1 William Blackstone, *Commentaries* 44

2 *The Records of the Federal Convention of 1787* (Max Farrand ed. 1966) 44

70 Fed. Reg. 35,388 ..... 36, 37, 57

71 Fed. Reg. 52,455 ..... 59, 60

Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750 (2010) 50

Agencies, Office of the Fed. Register 54

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 58

Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999 (2015) 38

Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 Colum. L. Rev. 1727 (2010) 49, 50

Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) 11

Federal Register & CFR Publications Statistics, Office of the Fed. Register (May 2016), perma.cc/C7DG-JPRH 54

Other Authorities—continued

Final Report of Attorney General's Committee on Administrative Procedure, U.S. Gov't Printing Office (1941) 54

Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. Rev. 209 (2015) 50

Jack Shulimson & Major Charles M. Johnson, *U.S. Marines in Vietnam: The Landing and the Buildup, 1965* (2013) 13

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) ..... *passim*

Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449 (2011) 38

Matthew J. Friedman, *PTSD History and Overview*, Nat'l Ctr. for PTSD, U.S. Dep't of Veterans Affairs 58

Montesquieu, *Spirit of the Laws* bk. XI (O. Piest ed., T. Nugent trans. 1949) 44

Nicholas J. Schlosser, *In Persistent Battle: U.S. Marines in Operation Harvest Moon* 18 (2017) 13

Peter H. Schuck, *Foundations of Administrative Law* (2d ed. 2003) 26

Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, Tex. L. Rev. (forthcoming 2019) 50

Other Authorities—continued

Restatement (Second) of Contracts § 206 (1981) 61

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. 1 (1996) 27, 32, 38, 41

S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945), *reprinted in* Administrative Procedure Act: Legislative History, S. Doc. 248, at 18 (1944 – 1946) 31

Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Geo. L.J. 1863 (2008) 50

The Federalist No. 47 (James Madison) (C. Rossiter ed., 1961) 44

The Federalist No. 81 (Alexander Hamilton) (J. Cooke ed., 1961) 44

Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203 (2004) 40, 41

Webster's New Twentieth Century Dictionary (2d ed. 1967) 57

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (Pet. App. 1a-19a) is reported at 869 F.3d 1360. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 20a-25a) is unreported but available at 2016 WL 337517. The Federal Circuit's order denying rehearing en banc and the opinion dissenting from the denial (Pet. App. 44a-54a) are reported at 880 F.3d 1378.

JURISDICTION

The court of appeals entered its judgment on September 7, 2017. Pet. App. 1a. The Court granted certiorari on December 10, 2018. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

REGULATION INVOLVED

The Department of Veterans Affairs' New and Material Evidence regulation, 38 C.F.R. § 3.156, provides:

> (a) General. A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise

a reasonable possibility of substantiating the claim.

* * *

(c) Service department records.

(1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

* * *

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

INTRODUCTION

In *Bowles* v. *Seminole Rock & Sand Co.*, the Court announced, without supporting reasoning, that "the ultimate criterion" when construing a regulation "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. 410, 414 (1945). The Court identified no statute, no constitutional provision, no precedent, and no underlying logic to support this rule. It was, as Justice Scalia observed, "*ipse dixit*." *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part). Yet the Court has applied the doctrine repeatedly since; in particular, in *Auer* v. *Robbins*, 519 U.S. 452 (1997), the Court deferred to an agency interpretation first presented in an agency's *amicus* brief.

Seminole Rock-Auer deference (or simply "*Auer* deference") is a rule of judicial decisionmaking. But the effect of that rule is to vest administrative agencies with expansive lawmaking authority. If a regulation has multiple reasonable readings, an agency may make a *policy* judgment about which interpretation it prefers, rather than a judgment about the best *legal* interpretation of the regulation. Because of *Auer* deference, that agency judgment has the force of law.

Importantly, *Auer* deference affects the outcome of a case only when the agency's proffered interpretation is "*not* the fairest reading of the regulation." *Decker*, 568 U.S. at 617 (Scalia, J.). It therefore operates to displace the interpretation of the regulation that would control in the absence of this especially weighty deference doctrine.

Over the intervening years, three potential justifications for *Auer* deference have emerged. The first attempts to identify a legal basis for the doctrine: the contention that an agency's "power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). The other two justifications are policy-based—assertions that an agency has "special insight into its intent" and that an agency often "possesses special expertise" regarding the technical details of a regulation. *Decker*, 568 U.S. at 618 (Scalia, J.).

These rationales lack merit. *Auer* deference is not a component of any lawmaking authority that Congress delegated to administrative agencies; on the contrary, it circumvents the limits that Congress has imposed on agency authority. Nor does *Auer* deference aid a court in understanding a regulation's meaning: not only is interpretation a legal question that courts are best equipped to resolve, but *Auer* deference permits agencies to rest on their current policy views standing alone. Finally, while agencies often possess technical knowledge, Congress has adopted procedures in the APA that specify how agencies may apply their expertise to create law.

Auer deference thus lacks any substantial legal or policy justification. But that is not the only reason why the Court should revisit and reverse the doctrine. *Auer* deference undermines the notice-and-comment procedures that Congress established in the APA to ensure public participation in rulemaking. In so doing, it enables an agency to bypass this Court's holdings regarding the limited weight given

to interpretive rules. *Auer* deference also injects intolerable uncertainty into the meaning of regulations. Finally, *Auer* deference is inconsistent with basic separation-of-powers principles that underlie our system of government.

In saying this, we are mindful that *stare decisis* is a cornerstone of the law. It requires the Court to act with caution when overruling precedent. But *Auer*'s substantial flaws constitute special justifications that warrant overturning this deference doctrine.

That is especially so because *stare decisis* applies with less force here. Because *Auer* is a judge-made rule of judicial procedure—and not the interpretation of a statute or constitutional provision—*stare decisis* has limited application. Additionally, the public has no reliance interests in the doctrine; to the contrary, *Auer* deference promotes *in*stability in administrative law. And circumstances have changed materially since 1945: the Court has never squared *Seminole Rock* with the subsequent enactment of the APA, nor with the evolution of the administrative state.

When all of these factors are weighed in the balance, the conclusion is clear: an agency should be "free to interpret its own regulations," but courts should "decide—with no deference to the agency—whether that interpretation is correct." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment).

STATEMENT

A. Legal background.

1. Seminole Rock *and* Auer.

The doctrine of deference to an agency's interpretation of its own regulation began with *Seminole Rock*. There, the Court addressed "the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188," a World War II-era price control. 325 U.S. at 411-412. The Court stated, without citation, that "[s]ince this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." *Id.* at 413-414. The Court further concluded, without explanation, that the "ultimate criterion" for interpreting a regulation is "the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414.

Turning to the regulation at issue, the Court began by examining the plain meaning of the text, finding that it supported the government's position. 325 U.S. at 414-417. The Court then referred to a "bulletin issued" by the agency and an agency report to Congress, both of which advanced the same construction. *Id.* at 417. In view of these agency statements, the Court stated that "[a]ny doubts concerning" the government's interpretation "are removed by reference to the administrative construction." *Ibid.*

At the time, courts did not universally understand *Seminole Rock* as a watershed development. The very next year, in 1946, the Fourth Circuit rejected a broad interpretation of the ruling. It cited

Seminole Rock, together with *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), only for the proposition that agency views are "entitled to respectful consideration by [the courts] in interpreting [a] regulation." *Southern Goods Corp.* v. *Bowles*, 158 F.2d 587, 590 (4th Cir. 1946). While citing *Seminole Rock*, the court of appeals flatly rejected any binding deference rule: "It would be absurd to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department." *Ibid.*

Twenty years later, this Court returned to *Seminole Rock* in *Udall* v. *Tallman*, 380 U.S. 1 (1965). The Court referenced the "great deference" due to "the interpretation given the statute by the officers or agency charged with its administration" (*id.* at 16)—the principle known today as *Chevron* deference. With no more than a citation to *Seminole Rock*—and without elaboration—the Court concluded that, "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Ibid.* The Court ultimately held that, if an agency's "interpretation is not unreasonable," courts must defer to it. *Id.* at 18.

In *Thorpe* v. *Housing Authority of City of Durham*, 393 U.S. 268 (1969), the Court extended *Seminole Rock* deference to an agency's private letters issued during the pendency of litigation. *Id.* at 276 & nn.22-23 (describing letters from an agency assistant secretary and chief counsel). That same year, referencing a regulation that was "not free from ambiguity," the Court applied *Seminole Rock* and found "it dispositive that the agency responsible for promul-

gating and administering the regulation has interpreted it." *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969).

While the Court analyzed the regulatory text in *Seminole Rock* and *Tallman*, this deference principle soon evolved into one of deference in the first instance, with minimal independent judicial assessment of the regulation itself. In *Ehlert* v. *United States*, 402 U.S. 99 (1971), the Court explained that it "need not take sides" about the proper construction of a term; "since the meaning of the language is not free from doubt," the Court stated that it must "regard as controlling a reasonable, consistently applied administrative interpretation." *Id.* at 105.

The Court took a similar approach in *United States* v. *Larionoff*, 431 U.S. 864 (1977), where it held that it "need not tarry * * * over the various ambiguous terms and complex interrelations of the regulations." *Id.* at 872-873. The Court stated that, under *Seminole Rock*, so long as the agency's "interpretation is not plainly inconsistent with the wording of the regulations," it is bound "to accept the Government's reading of those regulations as correct." *Ibid.*[1]

The high-water mark for *Seminole Rock* came in *Auer*, which addressed the Department of Labor's regulations regarding an employee's exemption from overtime pay. 519 U.S. at 455. The Court deferred to

---

[1] The Court continued to apply *Seminole Rock* in this manner. See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Stinson* v. *United States*, 508 U.S. 36, 45 (1993); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *United States* v. *Swank*, 451 U.S. 571, 589 (1981).

the position the Secretary of Labor set forth "in an *amicus* brief filed at the request of the Court." *Id.* at 461. It stated that because the regulation at issue, "the salary-basis test," "is a creature of the Secretary's own regulations, his interpretation of it is * * * controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Ibid.*

Since *Auer*, the Court has repeatedly deferred to an agency's interpretation of a regulation offered in briefs before this Court. *E.g.*, *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 613 & n.3 (2011); *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 208-210 & n.7 (2011); *Williamson* v. *Mazda Motor of Am., Inc.*, 562 U.S. 323, 336 (2011); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 884 (2000). It has done so even when the position the agency advances conflicts with its earlier interpretation of the same regulation. See *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 295-296 & n.7 (2009).

The Court has held that *Auer* likewise compels deference to an "internal" agency memorandum that "appears to have [been] written in response" to the litigation at issue. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007). See also *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 278 (2009).

In recent years, the Court has twice narrowed the reach of *Auer* deference.

Deference is inapplicable, the Court held, when "the underlying regulation does little more than restate the terms of the statute itself." *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006). "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience

to formulate a regulation, it has elected merely to paraphrase the statutory language." *Ibid.*

In addition, when an agency's "interpretation of ambiguous regulations" would "impose potentially massive liability" on a party "for conduct that occurred well before that interpretation was announced," that is a "strong reason[] for withholding the deference that *Auer* generally requires." *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155-156 (2012). In so concluding, the Court recognized that *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." *Id.* at 158.

2. The Veterans Affairs regulations.

The Department of Veterans Affairs (VA) administers a benefits program for veterans who suffer from disabilities stemming from in-service injuries. See 38 U.S.C. §§ 1101-1163.

a. The United States will pay compensation benefits to a veteran for "disability resulting from personal injury suffered" by a veteran "in line of duty." 38 U.S.C. §§ 1110, 1131. Congress has delegated to the VA "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [VA]." *Id.* § 501(a). This authority extends specifically to "regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits." *Id.* § 501(a)(1).

b. Exercising this authority, the VA has employed notice-and-comment procedures to promul-

gate regulations establishing a system for providing compensation "to a veteran because of service-connected disability." 38 C.F.R. § 3.4. In particular, VA regulations provide compensation for service-related post-traumatic stress disorder, or PTSD. *Id.* § 3.304(f). Such a claim requires (1) "medical evidence diagnosing the condition"; (2) "a link, established by medical evidence, between current symptoms and an in-service stressor"; and (3) "credible supporting evidence that the claimed in-service stressor occurred." *Ibid.*

The regulation governing the medical diagnosis element (38 C.F.R. § 3.304(f)) incorporates the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), Fifth Edition. *Id.* § 4.125(a). The DSM, in turn, states that a clinical diagnosis of PTSD rests on multiple necessary "criteria." *Diagnostic and Statistical Manual of Mental Disorders* 271 (5th ed. 2013) (*DSM-5*). The first is "[e]xposure to actual or threatened death, serious injury, or sexual violence" in one of multiple enumerated ways, including "[d]irectly experiencing the traumatic event(s)" or "[w]itnessing, in person, the event(s) as it occurred to others." *Ibid.* Identifying the "traumatic events" (which includes "exposure to war as a combatant") is thus necessary to a medical diagnosis of PTSD. *Id.* at 274.

c. Recognizing that the vast majority of veterans file disability claims without the assistance of counsel, Congress has imposed on the VA a duty to assist claimants. See 38 U.S.C. § 5103A. In particular, when a veteran asserts "a claim for disability compensation," the VA is obligated to "locate" certain government records. *Id.* § 5103A(c)(1). These include "relevant records pertaining to the claimant's active

military, naval, or air service that are held or maintained by a governmental entity," so long as the claimant has furnished the VA "information sufficient to locate such records." *Id.* § 5103A(c)(1)(A). See also 38 C.F.R. § 3.159(c) ("VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency," including a veteran's "military records.").

d. The VA has promulgated regulations governing the circumstances in which it will revisit a prior denial of a veteran's claim for benefits.

First, 38 C.F.R. § 3.156(a) allows a veteran to "reopen" a denial by "submitting new and material evidence." New evidence is defined as "existing evidence not previously submitted to agency decisionmakers." *Ibid.* And "[m]aterial evidence" is "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." *Ibid.* When a veteran obtains relief pursuant to this subsection, the benefits awarded are effective as of the date of the application to reopen. *Id.* § 3.400(q).

Second, 38 C.F.R. § 3.156(c) allows a veteran to seek "reconsider[ation]" of a claim by demonstrating that the VA previously erred by failing to consider official service department records in the possession of the government. In contrast to Section 3.156(a), this remedial provision does not require "new and material" evidence.

Under Section 3.156(c), the VA "will reconsider" a claim "if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." *Id.* §

3.156(c)(1). The regulation specifies that "relevant official service department records" include "[s]ervice records that are related to a claimed in-service event, injury, or disease." *Ibid.* If the VA awards benefits "based all or in part on the records" that had previously existed but were not considered by the VA, the veteran is entitled to benefits retroactive to the date of his initial claim. *Id.* § 3.156(c)(3).

B. Factual background.

Petitioner James Kisor served on active duty in the Marine Corps from 1962 to 1966, including in the Vietnam War. Pet. App. 2a. He served with the 2nd Battalion of the 7th Marine Regiment. J.A. 21.

Petitioner fought in Operation Harvest Moon, a major battle against the Viet Cong that took place in December 1965. Pet. App. 3a & n.1. Harvest Moon was an especially deadly engagement. What was supposed to be an offensive mission became a rescue operation almost immediately; over 500 soldiers were killed in battle, including 56 U.S. Marines. See Nicholas J. Schlosser, *In Persistent Battle: U.S. Marines in Operation Harvest Moon* 18, 47 (2017).

On December 18, 1965, petitioner's company, H&S Company (J.A. 25), came under "attack[] at Ky Phu Hamlet by an estimated VC battalion." J.A. 21. Viet Cong attacked "with small arms, crew served weapons, hand grenades, and mortars." *Ibid.* Approximately a dozen members of petitioner's company died (J.A. 11), and more than one hundred Viet Cong soldiers were killed (J.A. 21). See also Jack Shulimson & Major Charles M. Johnson, *U.S. Marines In Vietnam: The Landing and the Buildup, 1965* 108-109 (2013) (recounting the "Fight at Ky Phu," including casualties sustained to H&S Company).

For petitioner, this event was deeply traumatic:

> I personally killed 2 Viet Cong snipers with my M14 rifle as their heads emerged from spider traps. This fact has tormented me during the past 41+ years. At the same time * * * one of my Marine buddies in our 2/7 Communications Platoon * * * was killed when a Viet Cong bullet ripped into his throat. I will never forget seeing his dead body. It also had a strong impact on me when * * * another Marine in my 2/7 Communications Platoon * * * was shot in the head at the same time.

J.A. 25.

As a result of his service, petitioner was awarded a Combat Action Ribbon, an award reserved for those who participate directly in active combat. J.A. 20. He also received a Presidential Unit Citation (with one bronze star), a Navy Unit Commendation, and a Vietnam Service Medal (with two bronze stars). *Ibid.*

Petitioner's combat activities have had lasting effects on him personally. Dr. Donald Davies, a psychiatrist who examined petitioner in connection with his benefits claim, explained that he suffers from repeated "flashbacks," which affect his everyday life. J.A. 31, 34. His injuries worsen "around December, because it reminds him of the Harvest Moon operation, by way of an anniversary reaction." J.A. 34. Prior to his military service, petitioner "liked to socialize and do things with other people"; now, however, petitioner "isolate[s] himself," is "social[ly] withdraw[n]," and schedules his activities "so as to encounter the fewest people." J.A. 32-34.

As the VA determined below, petitioner suffers from severe PTSD resulting from his service in Vietnam, especially his role in Operation Harvest Moon. J.A. 52. Petitioner suffers from "symptoms of recurrent explosive anger outbursts, daily intrusive thoughts, insomnia, chronic irritability, avoidance of triggers which remind him of Vietnam, suicidal ideation, anhedonia, social withdrawal and avoidance of people, and difficulty getting along with others and authority figures." *Ibid.* Altogether, the VA concluded that these injuries have caused "serious impairment in social and occupational functioning." *Ibid.* As Dr. Davies reported, petitioner's inability "to work in a formal vocational setting for over 20 years" is "a direct result of his war experiences in Vietnam." J.A. 39.

C. Proceedings below.

This action arises out of petitioner's claim for disability benefits based upon his service-connected PTSD.

1. On December 3, 1982, petitioner filed a claim with the VA Regional Office in Portland, Oregon. Pet. App. 2a, 30a. David Collier, a counselor at the Portland Veterans Center, submitted a letter describing his observations of petitioner stemming from "group and individual counseling." *Id.* at 2a. Collier identified "concerns that Mr. Kisor had towards depression, suicidal thoughts, and social withdraw[a]l." *Id.* at 2a-3a. Collier concluded that "[t]his symptomatic pattern has been associated with the diagnosis of Post-Traumatic Stress Disorder." *Id.* at 3a.

A subsequent psychiatric examination, however, suggested that petitioner suffered from "a personality disorder as opposed to PTSD." Pet. App. 3a. The

VA psychiatrist, Dr. Robin Henderson, reached this conclusion even though he admittedly "lost" a "portion of the original dictation" of petitioner's "PTSD examination." J.A. 13. Because of the lost records, Dr. Henderson could not "recall the specifics of any symptom review." *Ibid.* Instead, Dr. Henderson stated that he "recall[ed] that [he] was not impressed with the finding of post traumatic stress disorder." *Ibid.*

At the time, "[s]ervice records * * * related to [the] claimed in-service event" (38 C.F.R. § 3.156(c)(1)) that caused petitioner's PTSD were in the possession of the government. These records included petitioner's Department of Defense Form 214,[2] as well as his Combat History, Expeditions, and Awards Record.[3] Pet. App. 4a. This material "document[ed] his participation in Operation Harvest Moon." *Ibid.* See also J.A. 18-20. But the VA did not request these records or associate them with petitioner's claim file; the VA later acknowledged that these "service personnel records * * * were not requested by VA until November 2006." Pet. App. 34a-35a. See also J.A. 70.

The VA Regional Office denied petitioner's claim. Pet. App. 3a. The agency did not address petitioner's service records—because it had not obtained, or even requested, them. J.A. 15. It concluded that "post

---

[2] This record is petitioner's discharge form. See J.A. 18. It confirms that petitioner served in Vietnam, and it identified the nature of his service. *Ibid.*

[3] This record is the form "NAVMC 118(9)-PD (REV. 11-55)." J.A. 19. It documents that petitioner "participated in counter-insurgency operations" and "participated in operation 'Harvest Moon.'" *Ibid.*

traumatic stress neurosis, claimed by vet" was "not shown by evidence of record." *Ibid.*

2. On June 5, 2006, petitioner asked the VA to review its prior denial of his claim. Pet. App. 4a. This time, the VA Regional Office agreed that he has PTSD stemming from his service, and it therefore reopened petitioner's claim. *Id.* at 4a-5a. But it declined to award him retroactive benefits. *Ibid.*

After petitioner made his June 2006 request, the VA requested his "[s]ervice personnel records," which the VA received sometime after November 2006. Pet. App. 34a-35a. In September 2007, the VA found that petitioner suffers from service-connected PTSD and assigned him a disability rating of 50 percent, with benefits effective as of June 5, 2006. J.A. 41.[4]

The VA relied, in part, on petitioner's "[s]ervice * * * administrative records." J.A. 41. The VA regional office concluded that, because his "service administrative records show that [he is] a combat veteran (Combat Action Ribbon recipient), service connection for posttraumatic stress disorder has been established as directly related to military service." J.A. 42.

---

[4] In July 2007, Dr. Donald Davies wrote an extensive report diagnosing petitioner with PTSD. See J.A. 29-40. He concluded that the symptoms identified by both Mr. Collier and Dr. Henderson were consistent with PTSD, and thus it is "clear that the claimant was evincing symptoms of P.T.S.D. back in the 1980's." J.A. 38. Dr. Davies explained that, "at best, Dr. Robin Henderson simply misunderstood the impact of the claimant's war trauma upon him, and this may have something to do with having lost a significant part of the original P.T.S.D. examination." *Ibid.*

Petitioner filed a notice of disagreement, arguing that he is entitled to retroactive benefits and that he is more than 50 percent disabled. J.A. 45-49.

In March 2009, a decision review officer at the VA regional office determined that petitioner's proper disability rating was 70 percent. J.A. 50-55. The review officer "granted a 100 percent rating on an extraschedular basis" (Pet. App. 5a), concluding that "[e]ntitlement to individual unemployability is granted because [petitioner] is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." J.A. 54. The VA again based its decision on a range of evidence, including petitioner's "DD Form 214," as well as "records from Navy Personnel Command indicating veteran was awarded a Combat Action Ribbon." J.A. 51.

The VA, however, declined to adjust the effective date of the benefits eligibility determination. Pet. App. 5a-6a. It reasoned that "[a]t the time of the [original] decision the veteran did not have a clinical diagnosis of post traumatic stress disorder." J.A. 70. The VA did not address whether 38 C.F.R. § 3.156(c)—which provides retroactive benefits if the VA later bases an award on records that the VA earlier failed to consider—applies to petitioner.

3. In a non-precedential decision by a single Veterans Law Judge, the Board of Veterans' Appeals affirmed the regional office's denial of retroactive benefits. Pet. App. 26a-43a.

The Board recognized that the VA did not request petitioner's service records during its initial adjudication of his claim. Pet. App. 34a-35a. It thus acknowledged petitioner's argument regarding the "failure[]" of the VA to obtain "service personnel rec-

ords noting his participation in Operation Harvest Moon." *Id.* at 38a. The Board nonetheless held that this failure was not a basis for petitioner to obtain retroactive relief pursuant to 38 C.F.R. § 3.156(c). Pet. App. 39a-43a.

The Board admitted that the "service personnel records * * * fall under the purview" of the specific language of Section 3.156(c)(1)(i). Pet. App. 42a. But the Board denied petitioner retroactive benefits under Section 3.156(c) by holding that the term "relevant" includes a causation requirement. In the Board's view, "relevant" evidence is limited to material that "would suggest or better yet establish" the element of the claim that was found missing in the prior adjudication—here, "that the Veteran has PTSD as a current disability." *Ibid.* Because the Board did not believe that these records would have been "outcome determinative" of petitioner's original claim for benefits, the Board concluded that they are not "relevant." *Id.* at 42a-43a.

4. The Court of Appeals for Veterans Claims affirmed in another non-precedential decision issued by a single judge. Pet. App. 20a-25a. It restated the Board's conclusion that petitioner's "documents were not outcome determinative" and that they therefore did not qualify as "relevant" within the meaning of the regulation. *Id.* at 24a.

5. The Federal Circuit affirmed. Pet. App. 1a-19a. It acknowledged that "the heart of this appeal" is petitioner's "challenge to the VA's interpretation of the term 'relevant.'" *Id.* at 14a-15a. Citing both *Seminole Rock* and *Auer*, the court explained that it "defer[s] to an agency's interpretation of its own regulation as long as the regulation is ambiguous and the

agency's interpretation is neither plainly erroneous nor inconsistent with the regulation." *Id.* at 15a (quotation omitted).

The government argued that the Board was correct in holding that documents qualify as "relevant" only if they relate to the cause of the prior denial. Pet. App. 13a-14a. Petitioner, by contrast, argued that the regulation contains no such causation requirement and that a record is "relevant" if it tends a prove an element of a veteran's claim. *Id.* at 12a-13a.

The court of appeals "conclude[d] that the term 'relevant' in [Section] 3.156(c)(1) is ambiguous" because "[b]oth parties insist that the plain regulatory language supports their case," and because "neither party's position" was "unreasonable." Pet. App. 17a; see also *ibid.* ("[A] regulation is ambiguous on its face when competing definitions for a disputed term seem reasonable.") (quotation omitted).

The court found it "[s]ignificant[]" that "[Section] 3.156(c)(1) does not specify whether 'relevant' records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard." Pet. App. 15a. "This uncertainty in application suggests that the regulation is ambiguous." *Ibid.*

Ultimately, the court of appeals concluded that the VA's "interpretation does not strike [the Court] as either plainly erroneous or inconsistent with the VA's regulatory framework." Pet. App. 17a. The court thus deferred to the VA's interpretation of its own regulation. *Id.* at 17a-19a.

6. The court of appeals denied rehearing en banc (Pet. App. 44a-46a) over a three-judge dissent (*id.* at

47a-54a). The dissent noted the repeated calls to reconsider *Auer* deference by Members of this Court, circuit court judges, and academics. *Id.* at 48a-49a. Bound by *Auer* (*id.* at 49a), the dissenting judges would have held *Auer* inapplicable where, as here, the canon that a statute should be interpreted in favor of veterans' interests exists to resolve ambiguity in VA regulations. *Id.* at 50a-51a.

SUMMARY OF ARGUMENT

I. From its inception, the doctrine of deference to an agency's interpretation of its own regulation has lacked legal or policy justification. The genesis of the doctrine—*Seminole Rock*—contained no reasoning, and the proffered post hoc rationales do not support it. For three principal reasons, *Auer* deference is unjustified.

A. *Auer* is incompatible with the Administrative Procedure Act. When Congress delegates lawmaking authority to an agency, it does so on the understanding and with the command that the agency comply with the strictures of the APA. The APA, in turn, imposes safeguards on agencies' exercise of their lawmaking authority. In particular, notice-and-comment rulemaking requires notice, public participation, and agency accountability. *Auer* deference subverts this arrangement by allowing an agency to engage in subregulatory "interpretation" that binds the regulated public and the courts, but without any of the APA's procedural safeguards.

Auer is especially problematic because it gives agencies far wider latitude to issue binding rules of law than does the Court's deference doctrine under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). When Congress

delegates authority to issue binding regulations through notice-and-comment rulemaking, deference to the agency's interpretation of a statute is dependent on its adherence to that procedure. If an agency interprets a statute through some other means (such as interpretive guidance), *Chevron* deference does not apply. *Auer* deference, however, is not subject to a similar limitation: Agency interpretations of ambiguous regulations appearing in documents as informal as opinion letters and appellate briefs receive binding *Auer* deference.

B. *Auer* is a judge-made rule that destabilizes administrative law. The doctrine controls outcomes in only those cases where an agency adopts a reading of a regulation that, while reasonable, is not the *best* interpretation. Yet, when a private individual seeks to conform his or her conduct to law, all he or she can do is make a judgment about the regulation's *best* meaning. In this way, *Auer* is a permission slip for unpredictable and irregular agency action.

Auer deference is especially suspect in circumstances, like those here, where the agency has an economic interest in the outcome of the interpretive question. Deference to executive agencies rests on the premise that agencies act with impartiality when adopting rules that have the force of law. But when an agency changes the rules of the road in the context of deciding monetary claims brought against the government, those same presumptions do not obtain.

Two policy-based justifications have been offered in defense of *Auer*. One is the contention that an agency has insight into its original intent underlying a regulation. The other is that the agency has sub-

stantive policy expertise. Neither argument withstands scrutiny.

As to the first, the interpretation of a regulation is a strictly legal exercise, requiring analysis of the regulation's text and any other relevant material. Agencies have no greater capacity than courts to perform this task. What is more, *Auer* deference does not depend on the agency making a *legal* judgment; to the contrary, it gives the agency's interpretation the force of law even if policy considerations motivated the result. Thus, even if agencies had special capacity to identify the intent underlying a regulation (they do not), that still would not justify *Auer* deference.

As to the second policy justification, while agencies often possess technical expertise, Congress has articulated the ways in which agencies may bring their specialized experience to bear when making law. As it did here, Congress usually requires notice-and-comment rulemaking. *Auer* circumvents that congressional judgment.

C. *Auer* is also incompatible with separation-of-power principles. In the U.S. system of government, the one who makes the law must not also interpret it. But *Auer* deference renders an agency simultaneously a law's maker and its expositor. Overruling *Auer* is therefore necessary to restore the appropriate balance between the Executive and the Judiciary.

D. *Chevron* deference rests on agency *compliance* with the APA. *Auer* deference, by contrast, bestows the force of law on agency actions unconstrained by the APA's requirements. *Chevron* deference is therefore consistent with—and, indeed, sup-

ports—the conclusion that *Auer* and *Seminole Rock* were wrongly decided.

II. This is a rare circumstance in which overruling precedent is warranted. When examined on the merits, it is clear that both *Seminole Rock* and *Auer* are egregiously wrong. And, importantly, there are multiple additional reasons why *stare decisis* applies with appreciably less force here than it does elsewhere.

A. *Seminole Rock* was wrong when it was decided, and there are special justifications for overruling that decision and its progeny. This deference doctrine was not just badly reasoned—it had no reasoning at all. *Auer* has also proven harmful in practice.

B. *Seminole Rock* and *Auer* are not interpretations of a statute or the Constitution. Rather, they create a standard of judicial decisionmaking. *Stare decisis* does not hold the same weight with respect to such court-made rules of judicial procedure.

C. Additionally, *stare decisis* has reduced effect because there are no private reliance interests resting on *Auer*'s continued vitality. To the contrary, *Auer* undermines regulatory predictability and invites legal *in*stability. That is so because *Auer* allows an agency to change the meaning of its regulations (including reversal of pre-existing positions) in the midst of a lawsuit, regardless whether the new interpretation is the best one. *Stare decisis*—a doctrine designed to *protect* stability in the law—should not shield this erroneous doctrine from review.

D. *Stare decisis* also has less strength because circumstances have changed greatly since the Court introduced the doctrine in *Seminole Rock*. Congress

enacted the APA the year after *Seminole Rock*. While the Court has applied the doctrine repeatedly since, it has never squared *Seminole Rock* with the text and structure of the APA. The size and nature of administrative agencies have also grown and evolved since 1945. These changes provide legal and practical reasons warranting a reexamination of *Auer* deference.

III. Petitioner offers the best construction of Section 3.156(c). If the Court overrules *Auer* deference, it may wish to leave this question to the court of appeals in the first instance. Alternatively, if the Court chooses to reach the issue, petitioner should prevail in view of the regulation's plain meaning.

ARGUMENT

I. *Seminole Rock* and *Auer* are wrong.

Auer deference is a judicially-created rule of legal interpretation that instructs courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. That doctrine bestows on agencies expansive, unreviewable lawmaking authority: When there is more than one reasonable interpretation of a regulation, *Auer* authorizes an agency to pick the interpretation it favors as a policy matter—and gives that choice the force and effect of law. "To regulated parties, the new interpretation might as well be a new regulation." *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring in the judgment).

Seminole Rock announced this doctrine without supplying any justification—and none exists. This deference doctrine is not just wrong as a legal matter, but it has also proven extremely harmful in practice. *Auer* deference causes agencies to circumvent

the critical requirements of the APA; it injects intolerable unpredictability into the legal system; and it is incompatible with the basic principle that the one who makes the law should not also interpret it.

A. *Auer* deference is inconsistent with the APA.

In 1946, the year after the Court decided *Seminole Rock*, Congress enacted the APA, "the fundamental charter of the administrative state." Peter H. Schuck, *Foundations of Administrative Law* 53 (2d ed. 2003). The APA's "safeguards * * * against arbitrary official encroachment on private rights" serve "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950). Whatever could have been said about *Seminole Rock* prior to 1946, the deference doctrine should not have survived the APA's enactment.

1. Auer *deference circumvents the APA's safeguards governing agency rulemaking.*

Auer deference is inconsistent with the text, structure, and purpose of the APA. There is no indication whatever that, in enacting a statute to carefully impose procedural checks on agency rulemaking, Congress nonetheless intended for agencies to wield substantial lawmaking authority via subregulatory action—that is, agency action that lacks the formality of notice-and-comment rulemaking.

Indeed, in *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001), the Court held that agency actions lacking requisite formality, including interpretive rules, do not warrant deference. *Auer* cannot be

reconciled with the rationale endorsed by the Court in *Mead*.

a. The Court has never assessed whether *Auer* deference can be squared with the text of the APA's judicial review provision—or the similar provisions of other statutes, modeled after the APA, that govern judicial review of various agency actions.

Section 706 of the APA provides that "the reviewing court"—not the agency—"shall * * * determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. An "agency action," in turn, "includes the whole or a part of an agency rule." *Id.* § 551(13). Section 706 similarly allocates to Article III courts the responsibility to "decide all relevant questions of law." *Id.* § 706.

Section 706 thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in * * * regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J.). Given the statutory command, "it is wrong for the courts to abdicate their office of determining the meaning of the agency regulation." Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. 1, 9 (1996).

The statute authorizing the Federal Circuit's review of decisions from the Court of Veterans Claims, 38 U.S.C. § 7292, contains similar language. Section 7292(d)(1) directs that "the Federal Circuit shall decide all relevant questions of law." The proper meaning of 38 C.F.R. § 3.156(c)—the dispositive question below—is plainly a "relevant question of law." Congress has allocated such determinations to an Article III court, not to the VA.

b. In addition to the judicial review provision of the APA, Congress imposed several key limitations on agency action. The requirement of notice-and-comment rulemaking (see 5 U.S.C. § 553) is among the APA's chief "safeguards." *Morton Salt*, 338 U.S. at 644. The statute demands that agencies engage in deliberative lawmaking.

Notice. An agency generally must publish a proposed rule in the Federal Register, giving the public notice of the rule it proposes to adopt and the reasons it wishes to do so. See 5 U.S.C. § 553(b), (c), (d). Publication of the agency's reasoning ensures that the agency has in fact "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action," which necessarily requires providing "a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The APA precludes agencies from making law behind a curtain.

Public participation. The APA also provides the public a right to participate in the rulemaking process. Once a proposed rule is published, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). Critically, the agency must give "consideration of the relevant matter presented" to it by the public, and only then may the agency adopt a final rule. *Ibid.* With these APA provisions, "Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp.*

v. *Brown*, 441 U.S. 281, 316 (1979). In this way, "the notice-and-comment procedures of the Administrative Procedure Act [were] designed to assure due deliberation." *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996).

Judicial review. After an agency adopts a regulation, the APA provides for meaningful judicial review to preclude irregular agency action. Those adversely affected by the rule may challenge it on a variety of grounds, including that the agency failed to follow the requisite process or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). When, for example, there is a "lack of reasoned explication for a regulation," especially where the regulation is "inconsistent with" prior agency positions, courts properly declare a regulation unlawful. *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2127 (2016).

c. *Auer* deference, by contrast, "allow[s] agencies to make binding rules unhampered by notice-and-comment procedures." *Perez*, 135 S. Ct. at 1212 (Scalia, J.). It enables "the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion'"—all without the notice, public participation, and agency accountability that the APA requires. *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1052-1053 (2018) (Thomas, J., dissenting from the denial of certiorari).

Auer deference does not depend on any *public* statement of the agency's views—the Court has previously deferred to an "internal memorandum" (*Coeur Alaska*, 557 U.S. at 278), private letters an agency issued during the pendency of litigation (*Thorpe*, 393 U.S. at 276 & nn.22-23), and a memo-

randum "issued only to internal [agency] personnel and which the [agency] appears to have written in response to [the] litigation" (*Long Island Care*, 551 U.S. at 171).

Even if an agency invites comment on an interpretation of its own regulations, it is under no obligation to meaningfully consider—much less respond to—the data and views supplied by the public. *Auer* thus guts the public notice and public participation requirements that lie at the heart of the APA.

In addition, the substantive standards that govern the validity of the underlying agency action differ markedly. When an agency revises a regulation that interprets a statute, an unexplained change in position receives no deference. *Encino Motorcars*, 136 S. Ct. at 2127. Rather, an "agency must show that there are good reasons for the new policy." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

There are no similar limitations when the agency changes its interpretation of an ambiguous regulation. The Court has applied *Auer* deference even where the "[g]overnment's position * * * has fluctuated," without ever asking whether the government supplied *any* (much less a sufficient) rationale to support that change of position. *Kennedy*, 555 U.S. at 296 & n.7. Nor does *Auer* deference consider whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43.

Through the APA, Congress established procedural and substantive safeguards to protect the public from irregular agency lawmaking. But *Seminole Rock* and *Auer* license agencies to circumvent those safeguards when they interpret their own regula-

tions. That rule is squarely inconsistent with—and precluded by—the APA.

d. *Auer* deference is also incompatible with the Court's jurisprudence regarding interpretive rules.

The APA authorizes agencies to issue rules using procedures other than notice-and-comment rulemaking. For example, it explicitly provides for "interpretative rules" (5 U.S.C. § 553(b)(A)), which an agency may issue "to advise the public of the agency's construction of the statutes and rules which it administers." *Perez*, 135 S. Ct. at 1204 (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Interpretative rules are exempt from the notice-and-comment requirement, "mak[ing] the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules." *Ibid.*

"But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Perez*, 135 S. Ct. at 1204 (quoting *Guernsey Mem'l Hosp.*, 514 U.S. at 99). "[I]nterpretive rules," *Mead* holds, "enjoy no *Chevron* status as a class." 533 U.S. at 232. Put another way, an interpretive rule "may 'persuade' a reviewing court, but will not necessarily 'bind' a reviewing court." *Long Island Care*, 551 U.S. at 172 (citation omitted).[5]

---

[5] Congress specifically intended that result. In the Senate Report on the APA, Congress observed "that 'interpretative' rules—as merely interpretations of statutory provisions—are subject to plenary judicial review, whereas 'substantive' rules involve a maximum of administrative discretion." S. Comm. on the Judiciary, 79th Cong. (Comm. Print 1945), *reprinted in* Administrative Procedure Act: Legislative History, S. Doc. 248, at 18 (1944 – 1946).

Auer thus creates the anomalous result that courts must give interpretive rules binding deference *if* the underlying law being interpreted is a regulation rather than a statute. For this reason, *Auer* upends "the import of interpretive rules' exemption from notice-and-comment rulemaking." *Perez*, 135 S. Ct. at 1211-1212 (Scalia, J.). "Agencies may now use [interpretive] rules not just to advise the public, but also to bind them" because "[i]nterpretive rules that command [*Auer*] deference *do* have the force of law." *Ibid.*[6]

Coeur Alaska highlights that *Auer* is incompatible with *Mead*. The Court held, in *Coeur Alaska*, that an agency interpretation was "not subject to sufficiently formal procedures to merit *Chevron* deference," but it was nonetheless entitled to *Auer* deference "because it interprets the agencies' own regulatory scheme." *Coeur Alaska*, 557 U.S. at 283-284. As a practical matter, it is immaterial whether a court applies *Chevron* or *Auer* deference—if either applies, the agency's interpretation is given the force of law. *Auer* therefore compels judicial deference to the very agency actions that *Mead* holds are ineligible for deference.

In this way, *Auer* is also inconsistent with this Court's longstanding description of the nature and effect of interpretive rules. In *Chrysler Corp.*, for ex-

---

[6] As Professor Robert Anthony put it more than two decades ago, it is an "anomaly" that "the Court maintains a standard for reviewing nonlegislative *interpretations of regulations* that is separate from and systematically more accepting of the agency's position than is its standard for reviewing nonlegislative *interpretations of statutes*." Anthony, *supra*, at 5 n.11 (emphasis added).

ample, the Court explained that "[i]nterpretive rules are 'issued by an agency to advise the public of the agency's construction of the statutes *and rules* which it administers.'" 441 U.S. at 302 n.31 (emphasis added). As to the whole category of interpretive rules—which necessarily includes an agency's interpretations of its "substantive rules" (that is, its own regulations)—none "have the force and effect of law." *Ibid.* See also *Guernsey Mem'l Hosp.*, 514 U.S. at 99 (same).

An agency's interpretation of its own regulation is, at best, an interpretive rule. Under *Chrysler Corp.*, such an interpretation does not have the force of law and therefore deserves no deference. That should answer the question presented here—*Seminole Rock* and *Auer*, which hold otherwise, are incorrect.

2. Auer exceeds the scope of any congressional delegation of lawmaking authority.

What is more, *Auer* deference exceeds the authority that Congress has delegated to agencies for rulemaking.

The central "premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme." *Encino Motorcars*, 136 S. Ct. at 2125. *Chevron* deference, the Court has said, is a component of that delegated authority. See *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013); *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

One potential justification for *Auer* might be to hitch it to this same delegation of authority; an agency's "power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151. That is, *Auer* deference "presumes that * * * a delegation of rulemaking power implicitly assigns the agency a concomitant power to say what its own rules mean." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 654 (1996).

This justification is not tenable, however, because it would depart dramatically from the scope of authority that Congress may be understood to have delegated, either expressly or implicitly. An agency has lawmaking authority only so far as it employs the procedures that Congress has specified.

As the Court held in *Mead*, an "administrative implementation of a particular statutory provision qualifies for *Chevron* deference" in those circumstances in which "Congress delegated authority to the agency generally to make rules carrying the force of law," *and* "the agency interpretation claiming deference was promulgated *in the exercise of that authority*." *Mead Corp.*, 533 U.S. at 226-227 (emphasis added). That is, "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue *in the particular manner adopted*." *City of Arlington*, 569 U.S. at 306 (emphasis added).

The Court therefore accords an agency interpretation *Chevron* deference when Congress has made a delegation, prescribed a means for the agency "to promulgate binding legal rules," and the agency is-

sues rules "in the exercise of that authority." *Brand X*, 545 U.S. at 980-981. Conversely, "*Chevron* deference is not warranted" in circumstances where "the agency errs by failing to follow the correct procedures" that Congress has authorized. *Encino Motorcars*, 136 S. Ct. at 2125.

Here, Congress delegated to the Secretary of Veterans Affairs authority to engage in lawmaking through notice-and-comment rulemaking. 38 U.S.C. § 501(a)(1) (authorizing the VA to adopt "*regulations* with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits") (emphasis added). Congress thus identified "the particular manner" (*City of Arlington*, 569 U.S. at 306) in which the VA may create the governing law. The VA exercised that authority by issuing extensive regulations governing veterans' claims via notice-and-comment rulemaking, including the regulation at issue here. See 38 C.F.R. §§ 3.1 to 3.2600.

It follows that Congress has not delegated to the agency authority to adopt rules regarding the procedures for proof in veterans benefits claims except by means of amending the Code of Federal Regulations through notice-and-comment rulemaking. Because *Auer* deference confers the force of law on VA interpretations issued outside of notice-and-comment rulemaking, the lawmaking that *Auer* authorizes exceeds the authority Congress has delegated to the agency. See *Mead*, 533 U.S. at 232-233 ("[T]he terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law.").

To put the point differently, agency action taken without notice-and-comment cannot amend a rule that was promulgated through notice-and-comment procedures. As the D.C. Circuit explained:

> Obviously, [the agency] may for good cause, change the regulation and even its interpretation of the statute through notice and comment rulemaking, but it may not constructively rewrite the regulation, which was expressly based upon a specific interpretation of the statute, through internal memoranda or guidance directives that incorporate a totally different interpretation and effect a totally different result.

National Family Planning & Reprod. Health Ass'n, Inc. v. *Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992). Once an agency promulgates a regulation, the APA obligates the agency to return to the notice-and-comment rulemaking process to change the meaning of that regulation or give it further content. Were it otherwise, the safeguards contained in Section 553 of the APA would be meaningless. *Seminole Rock* and *Auer* are inconsistent with that core principle.[7]

B. *Auer* injects intolerable unpredictability into agency action.

Apart from its incompatibility with the text and structure of the APA, *Auer* deference should be set aside because it is fundamentally at war with basic

---

[7] The VA's own conduct evinces an awareness of this principle, as it has previously amended Section 3.156(c) through notice-and-comment rulemaking. See 70 Fed. Reg. 35,388. If the VA dislikes the results that flow from the best reading of the text that the VA itself drafted, it may undertake a new rulemaking.

principles of predictability and public notice at the heart of the APA.

When a member of the regulated public attempts to comply with the terms of a regulation, all he or she can do is make a judgment about the regulation's best interpretation. Under *Auer*, however, an agency may later endorse a different interpretation, which then has the force of law. In fact, *Auer* deference makes a difference in the outcome of a case only where an agency has chosen a reasonable interpretation of a regulation that is "*not* the fairest reading of the regulation." *Decker*, 568 U.S. at 617 (Scalia J.).

1. Auer *invites vague regulations, which limit the public's ability to conform conduct to law.*

As the Court has recognized, *Auer* "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *SmithKline Beecham Corp.*, 567 U.S. at 158 (quoting *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)). In light of *Auer*, "[i]t is perfectly understandable * * * for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting).

Justice Scalia described the problem in *Perez*:

> Because the agency (not Congress) drafts the substantive rules that are the object of those

> interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.

135 S. Ct. at 1212 (Scalia, J.). Accord Anthony, *supra*, at 11-12 (*Auer* deference "generates incentives to be vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures."); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1461 (2011); Manning, *supra*, at 656.[8]

In this way, *Auer* "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc.*, 564 U.S. at 69 (Scalia, J.). See also Manning, *supra*, at 669 ("*Semi-*

---

[8] These concerns are not merely theoretical. A recent survey showed that two in five agency rule-drafters are reported being influenced by the *Auer* doctrine when they write regulations. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1004, 1065-1066 (2015) (reporting results from study involving 128 participants from seven executive departments and two independent agencies). Specifically, 39 percent of agency respondents indicated that *Auer* "play[s] a role in [their] rule drafting decisions." *Id.* at 1061, 1073. Without drawing a conclusion, the study's author suggests that some rule-drafters may "attempt to avoid drafting ambiguous regulations," whereas others "may be saying they do not have to worry about being clear and precise, as they can always clarify and clean up in subsequent guidance." *Id.* at 1066-1067.

nole Rock deference disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it.").

Moreover, *Auer* deference, coupled with the capacious regulations it promotes, enable agencies to abruptly change course without engaging in notice-and-comment rulemaking. See, *e.g.*, *Gloucester Cty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017."); *G.G. ex rel. Grimm* v. *Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016) ("[T]he Department's interpretation of its own regulation, [Section] 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case.").

Such policy shifts often occur when there is a change in Administrations. While new Administrations certainly may alter past policies, "[t]he Administrative Procedure Act requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process." *North Carolina Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). "Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow." *Ibid.* Properly construed, "the APA contemplates

what is essentially a hybrid of politics and law—change yes, but only with a measure of deliberation and, hopefully, some fair grounding in statutory text and evidence." *Ibid.*

The vague regulations that *Auer* deference invites are antithetical to the due process principles embodied in the APA and elsewhere. They disserve the public interest.

2. Auer *deference is especially suspect when the agency is self-interested.*

Auer is particularly troublesome when agencies resolve regulatory ambiguities in favor of their own pecuniary self-interest.

Courts have rightly expressed skepticism of deference in circumstances where an "agency itself [is] an interested party" and the agency offers "self-serving views." *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987). See also *Chickaloon-Moose Creek Native Ass'n, Inc.* v. *Norton*, 360 F.3d 972, 980 (9th Cir. 2004) ("[A]s an interested party to the Deficiency Agreement that stands to gain or lose depending on the outcome of this litigation, the agency should not be accorded any deference.").

Indeed, agency deference is rooted in the presumption "that the agency's interpretation represents an impartial and disinterested exercise of its interpretative authority." Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203, 265 (2004). Where that presumption "is shown to be incorrect," such as where the agency's "interpretation is affected by self-

interest" in the outcome of the case, deference should not apply. *Ibid.*

Additionally, "judicial deference in cases of agency self-interest" "effectively makes the agency the judge in its own cause." Armstrong, *supra*, at 268. This sort of "[j]udicial deference to self-interested governmental action also carries a particular risk of undermining public confidence in governmental fairness and impartiality." *Id.* at 282. See also Anthony, *supra*, at 9-10.

3. There is no policy-based justification for Auer *deference.*

Two policy-based explanations for *Auer* have emerged over the years. One is that "the agency, as the drafter of the rule, will have some special insight into its intent when enacting it." *Decker*, 568 U.S. at 618 (Scalia, J.) (citing *Martin*, 499 U.S. at 150-153). The other is "that the agency possesses special expertise in administering its 'complex and highly technical regulatory program.'" *Ibid.* (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512). Neither contention supports the weight of *Auer*.

First, with respect to the argument that an agency has insight into what it actually meant to say in the regulation, there is no basis to conclude that an agency is better situated than a court to answer this question of law. The interpretation of a regulation turns on the relevant sources available to the public, principally the regulation's text and whatever additional materials that the agency made available in the course of the rulemaking process, including *Federal Register* publications. There is no basis to conclude that the agency, years or decades after the promulgation of a regulation, is better equipped to

resolve this legal issue. See *Decker*, 568 U.S. at 618 (Scalia, J.).[9]

What is more, even if an agency had special capacity to discern the intended meaning of the regulation itself, *Auer* deference does not depend on the agency's having done so. *Auer* does not obligate an agency to articulate what it believes to be the *best* reading of a regulation based on text and promulgation context. Rather, under *Auer*, agencies can and do make *policy* decisions regarding their preferred interpretations. *Auer* deference is not, therefore, a tool that helps ascertain the *best* reading of a regulation.

The second policy rationale for *Auer*—that an agency's policymaking expertise warrants deference to its views—"misidentifies the relevant inquiry." *Perez*, 135 S. Ct. at 1222 (Thomas., J.). "The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means," and "[j]udges are at least as well suited as administrative agencies to * * * interpret the meaning of legal texts." *Id.* at 1222-1223. While an agency may have "significant expertise" regarding the "complex and highly technical regulatory

---

[9] Indeed, the Court does not give significant weight to *post*-enactment congressional materials regarding the meaning of a statute. See, *e.g.*, *Reno* v. *Bossier Par. Sch. Bd.*, 520 U.S. 471, 484-485 (1997) ("'[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)); *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 260 (2011) (Sotomayor, J., dissenting) ([P]ostenactment legislative history created by a subsequent Congress is ordinarily a hazardous basis from which to infer the intent of the enacting Congress.").

program" it administers (*Thomas Jefferson Univ.*, 512 U.S. at 512), that is a justification for deferring to the regulations that the agency promulgates through notice-and-comment rulemaking. It is not a basis to confer the force of law on an agency's statements outside the procedures that the APA specifies for administrative lawmaking. See *Decker*, 568 U.S. at 618-619 (Scalia, J.).

Even if these justifications for *Auer* deference carried some weight, they merely suggest that courts should acknowledge the agency's expertise and historical role. That is the essence of *Skidmore* deference, which evaluates an agency's "body of experience and informed judgment." 323 U.S. at 140. Ultimately, under *Skidmore*, courts consider the extent to which an agency's views have the "power to persuade." *Ibid.* These policy contentions do not provide a rationale for *Auer*'s heavy weight on the scales. While courts should take due account of an agency's views and knowledge, interpretation of regulations is ultimately the role of courts—not agencies.

C. *Auer* deference is inconsistent with separation-of-powers principles.

"Given the reality that agencies engage in 'lawmaking' when they exercise rulemaking authority," deference to agencies' interpretations of their own vague regulations "contradicts the constitutional premise that lawmaking and law-exposition must be distinct." Manning, *supra*, at 654.

That premise is a foundational one. Montesquieu, whom The Federalist Papers identified as "[t]he oracle who is always consulted and cited on this subject" (The Federalist No. 47, at 301 (James Madison) (C. Rossiter ed., 1961)), explained that

"[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, *Spirit of the Laws* bk. XI, at 151-152 (O. Piest ed., T. Nugent trans. 1949). Similarly, "Blackstone condemned the practice of resolving doubts about 'the construction of the Roman laws' by 'stat[ing] the case to the emperor in writing, and tak[ing] his opinion upon it.'" *Decker*, 568 U.S. at 620 (Scalia, J.) (quoting 1 William Blackstone, *Commentaries* *58).

The Framers thus repeatedly reaffirmed that "the power of making ought to be distinct from that of expounding, the laws." 2 *The Records of the Federal Convention of 1787*, at 75 (Max Farrand ed. 1966) (Elbridge Gerry). The rationale for this established maxim was then, and remains today, grounded in common sense: "The Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws." *Ibid.* (Caleb Strong). See also Manning, *supra*, at 644 n.159 (collecting additional sources).

For just that reason, "our Constitution did not mirror the British practice of using the House of Lords as a court of last resort, due in part to the fear that he who has 'agency in passing bad laws' might operate in the 'same spirit' in their interpretation." *Decker*, 568 U.S. at 620 (Scalia, J.) (quoting The Federalist No. 81, at 543-544 (Alexander Hamilton) (J. Cooke ed., 1961)). "In short, a core objective of the constitutional structure was to ensure meaningful separation of lawmaking from the exposition of a

law's meaning in particular fact situations." Manning, *supra*, at 644. Accord *Perez*, 135 S. Ct. at 1218-1219 (Thomas, J.).

The Court's separation-of-powers cases—which uniformly deny Congress a role in interpreting or executing its own enactments—confirm the constitutional commitment to the separation of law-making from law-exposition. In *INS* v. *Chadha*, 462 U.S. 919 (1983), for example, the Court struck down the one-house legislative veto, which had allowed the House of Representatives to overrule the Attorney General on matters delegated to the executive branch. See also *Metropolitan Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (Congress "may not 'invest itself or its Members with either executive power or judicial power.'").

Because *Auer*'s practical effect is to vest in a single branch the law-making and law-interpreting functions, *Auer* is incompatible with the separation-of-powers principles that animate the Constitution. See *Talk Am., Inc.*, 564 U.S. at 68 (Scalia, J.). To conclude otherwise "would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J.). See also *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) (holding that the Court must "assume [that Congress] legislates in the light of constitutional limitations").

D. *Chevron* deference confirms the flaws of *Auer* deference.

The reasons why courts defer to agency actions in other contexts—most notably *Chevron* deference—

are independent of *Auer* deference. In fact, *Chevron* deference serves to highlight *Auer*'s flaws.

Chevron deference rests on congressional delegations of lawmaking authority to the agencies. See *City of Arlington*, 569 U.S. at 296; *Brand X*, 545 U.S. at 980; *Mead*, 533 U.S. at 227-230. See also pages 33-35, *supra*. As the Court held in *Mead*, *Chevron* deference attaches when an agency exercises its delegated authority in the manner that Congress prescribed, which is usually through the APA's requirement of notice-and-comment rulemaking. See *Mead*, 533 U.S. at 227-230. Agency actions *outside* the APA's protections, including agency interpretive rules and other agency interpretations, are not entitled to such deference. *Ibid.*

Chevron deference therefore promotes, rather than skirts, notice-and-comment rulemaking. When the APA's procedural safeguards are respected, judicial deference to agency interpretations of ambiguous statutory text is consistent with the APA's structure and purpose. *Auer* deference, by contrast, is not constrained by the APA's requirements. See *Decker*, 568 U.S. at 620 (Scalia, J.) ("*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.").

Additionally, *Chevron* deference does not centralize the functions of law-making and law-interpreting within a single entity. See Manning, *supra*, at 639 (Under *Chevron*, "separation remains between the relevant lawmaker (Congress) and at least one entity (the agency) with independent authority to interpret the applicable legal text.").

Chevron deference is thus consistent with—and, indeed, supports—the conclusion that *Auer* and *Seminole Rock* were wrongly decided.

II. *Stare decisis* does not require the Court to retain *Seminole Rock* and *Auer*.

Although the Court "approach[es] the reconsideration of [its] decisions with the utmost caution, *stare decisis* is not an inexorable command." *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018) (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009)). The special justifications necessary to overcome *stare decisis* are present here—and *stare decisis* applies with appreciably less force in this unique context.

A. Special justifications warrant overruling *Seminole Rock* and *Auer*.

What the Court recently said in *Wayfair* applies with full force here: while *Seminole Rock* "was wrong on its own terms when it was decided," experience and practical developments have "made its earlier error all the more egregious and harmful." *Wayfair*, 138 S. Ct. at 2097.

Seminole Rock, the doctrine's origin, was "badly reasoned." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). In fact, it lacked reasoning entirely. See *Decker*, 568 U.S. at 617 (Scalia, J.) (describing *Seminole Rock* as resting on "*ipse dixit*").

Experience has shown that original error all the more serious and harmful. Indeed, *Auer* deference produces "inherent confusion," and, after being "tested by experience," *Auer* deference has proven detrimental. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-174 (1989). *Auer* creates contradictory

standards for interpretive rules. See pages 31-33, *supra*. And it injects enormous unpredictability into the meaning of regulations, authorizing reversals of agency positions without notice-and-comment rulemaking. See pages 36-43, *supra*.

Auer deference is also "a direct obstacle to the realization of important objectives embodied in other laws." *Patterson*, 491 U.S. at 173. In particular, its application authorizes circumvention of the APA's rulemaking requirements. See pages 26-31, *supra*.

B. *Stare decisis* applies with less force to judicially-created interpretive principles.

Stare decisis has "special force" in statutory interpretation because "Congress remains free to alter what [the Court has] done." *Patterson*, 491 U.S. at 172-173. In constitutional cases, *stare decisis* reflects the need for stability in construing the Nation's charter. See *Crawford* v. *Washington*, 541 U.S. 36, 75 (2004).

The *Auer* deference principle falls into neither category. The Court has never identified a statutory or constitutional underpinning for the doctrine—as we have explained, there is none. Although the doctrine affects a very significant transfer of power to administrative agencies, it is a court-crafted interpretive rule.

In *Pearson*, the Court explained that "[r]evisiting precedent is particularly appropriate where" it "consists of a judge-made rule" related to "the operation of the courts." 555 U.S. at 233. There, the Court overturned *Saucier* v. *Katz*, 533 U.S. 194 (2001), which required courts to address the substantive

constitutional issue before resolving a claim of qualified immunity. This rule was, *Pearson* explained, "judge made" and "implicate[d] an important matter involving internal Judicial Branch operations." 555 U.S. at 233-234. For that reason, "[a]ny change should come from this Court, not Congress." *Id.* at 234.

The Court noted that the standards employed in determining whether to adhere to *stare decisis*—such as whether the original decision was "badly reasoned" or "proved to be 'unworkable'"—are "appropriate when a constitutional or statutory precedent is challenged." *Pearson*, 555 U.S. at 234. But those standards "are out of place" for judge-made rules governing judicial decisionmaking. *Ibid.*

So too here. Because *Auer* deference is a similar procedural, "judge made" rule, *stare decisis* does not apply with the same force as in statutory and constitutional cases. See also *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995) (The "role" of *stare decisis* "is somewhat reduced * * * in the case of a procedural rule * * *, which does not serve as a guide to lawful behavior."); *Payne*, 501 U.S. at 828 (noting the decreased weight of *stare decisis* in cases "involving procedural and evidentiary rules"); *Alleyne* v. *United States*, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring) ("[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced.").

In fact, it is not clear that *stare decisis* applies at all in the context of "deference regimes," which "are more like canons of statutory construction." Connor N. Raso & William N. Eskridge, Jr., Chevron *as a*

Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 Colum. L. Rev. 1727, 1765 (2010). See also Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, Tex. L. Rev. (forthcoming 2019) ("[I]nterpretive methodologies do not warrant stare decisis effect.").

Indeed, there is broad scholarly consensus that this Court's precedents make *stare decisis* considerations inapplicable in the context of interpretive principles.[10] Ultimately, it is appropriate to "characteriz[e] deference doctrines as canons of statutory construction, and not binding precedents." Raso & Eskridge, *supra*, at 1817. See also *Perez*, 135 S. Ct. at 1214 n.1 (Thomas, J.) (questioning application of *stare decisis* to *Auer* deference); Kozel, *supra*, at 74 (contending that "*Auer* puts itself beyond the purview of stare decisis").

---

[10] See, *e.g.*, Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. Rev. 209, 218 (2015) ("Notwithstanding widespread support for the doctrine of stare decisis on *substantive statutory issues*, however, federal courts generally do not give stare decisis effect to their *methodological decisions* in statutory interpretation cases."); Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1754 (2010) ("Methodological stare decisis—the practice of giving precedential effect to judicial statements about methodology—is generally absent from the jurisprudence of mainstream federal statutory interpretation."); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Geo. L.J. 1863, 1875 (2008) ("Although the Supreme Court has not been explicit about whether it gives *stare decisis* effect to doctrines of statutory interpretation, examination of its statutory interpretation jurisprudence makes clear that it does not.").

C. Private reliance interests favor overruling *Seminole Rock* and *Auer*.

Stare decisis also protects the reliance interests of private parties. As one example, "when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course." *Lawrence* v. *Texas*, 539 U.S. 558, 577 (2003). By contrast, where there are no "legitimate reliance interest[s]" at stake, *stare decisis* has less force. *Wayfair*, 138 S. Ct. at 2098. See also *Pearson*, 555 U.S. at 233 (When a doctrine does "not affect the way in which parties order their affairs," abandoning past precedent is more appropriate because "a departure would not upset expectations.").

Private parties are highly unlikely to rely on *Auer*, because it does not authorize any particular result with respect to any particular rule. Indeed, one of *Auer*'s principal effects is to promote legal *in*stability. At its core, *Auer* deference gives the force of law to an agency's interpretation of a regulation adopted *after a dispute begins*. See, *e.g.*, *Coeur Alaska*, 557 U.S. at 278; *Long Island Care*, 551 U.S. at 171; *Auer*, 519 U.S. at 461; *Thorpe*, 393 U.S. at 276 & nn.22-23. That is so even if the new interpretation departs from an old one. See *Kennedy*, 555 U.S. at 296 & n.7.

Worse yet, this deference doctrine affects the outcome of a dispute only where an agency has chosen an interpretation of a regulation that, although reasonable, is not the *best* one. See *Decker*, 568 U.S. at 617 (Scalia J.). But, when structuring conduct to comply with a regulation, all a private party can do

is make a judgment about the regulation's *best* meaning.

The mischief that *Auer* creates is especially pronounced when there is a change of presidential Administrations. Cf. *North Carolina Growers' Ass'n, Inc.*, 702 F.3d at 772 (Wilkinson, J.). *Auer* enables one Administration to reverse the course set by its predecessor, altering binding rules of law based on nothing more than a brief filed in court, a letter posted on a website, or an internal memorandum sent to agency staff.

Auer deference thus strips regulations of stability; it "allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties." *Perez*, 135 S. Ct. at 1221 (Thomas, J.). See also, *e.g.*, *Garco Constr.*, 138 S. Ct. at 1053 (Thomas, J.) ("While Garco was performing its obligations under the contract, the base adopted an interpretation of its access policy that" changed the terms of the contract, allowing the agency to "unilaterally modify [the] contract by issuing a new 'clarification' with retroactive effect.") (quotation omitted).

To the extent administrative agencies' interests are even relevant, they cannot assert any "*legitimate* reliance interest" in the *Auer* interpretive approach. *Wayfair*, 138 S. Ct. at 2098 (emphasis added). If *Auer* is repudiated, agencies will not be foreclosed from adopting any permissible interpretation of a regulation that they desire—or even to replace the regulatory regime entirely. All they need do is act through notice-and-comment rulemaking for their actions to have the force of law.

In sum, rather than advancing reliance interests, *Auer* deference "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc.*, 564 U.S. at 69 (Scalia, J.). When, as here, an existing doctrine "itself causes uncertainty," that is a strong reason to displace it. *Lawrence*, 539 U.S. at 577.

D. The administrative state has evolved substantially since 1945.

The dramatic change in circumstances since 1945 is an additional reason why *stare decisis* should not preclude overruling *Seminole Rock* and *Auer*. See *Wayfair*, 138 S. Ct. at 2096-2097.

To begin with, *Seminole Rock*, decided in 1945, pre-dated the 1946 APA. While this Court has applied and extended *Seminole Rock* on numerous occasions since the APA's enactment, the Court has never squared the deference doctrine with the text and structure of the APA.[11]

---

[11] The *Seminole Rock* era, moreover, featured the legislative veto of agency action. As Justice White observed in 1983, "[t]he prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies." *Chadha*, 462 U.S. at 967-968 (White, J., dissenting). At that time, "nearly 200" statutory provisions contained a legislative veto. *Ibid.* The statute underlying *Seminole Rock*, the Emergency Price Control Act, was itself structured to terminate "upon the date specified in a concurrent resolution by the two Houses of the Congress." Pub. L. No. 77-421 § 1(b), 56 Stat. 23, 24 (1942). When the Court decided *Seminole Rock*, direct congressional supervision of agency action was commonplace. Today, it is constitutionally forbidden.

The size and scope of the administrative state has also changed substantially since *Seminole Rock*. In 1941, the Code of Federal Regulations listed 111 different departments, bureaus, divisions, and independent agencies; today, the Federal Register identifies four times as many: 445.[12] The 1945 volume of the Federal Register contained 15,508 pages; in 2015, it contained more than five times that number: 81,402 pages.[13] In 1950, the Code of Federal Regulations spanned 9,745 pages; in 2015, it reached a mammoth 178,277 pages, nearly 20 times as large.[14] And this just scratches the surface: it is not uncommon that "[s]everal words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities." *Appalachian Power Co.*, v. *EPA*, 208 F.3d 1015, 1019 (D.C. Cir. 2000). See also *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting).

Administrative agencies today "wield[] vast power and touch[] almost every aspect of daily life." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Conferring on agencies binding authority to interpret their own regulations has far broader—and much more troubling—implications now than it had when *Seminole Rock* was decided 74 years ago. These changed circum-

---

[12] Compare *Final Report of Attorney General's Committee on Administrative Procedure*, U.S. Gov't Printing Office, 8 n.1 (1941), with *Agencies*, Office of the Fed. Register (captured Jan. 18, 2019), perma.cc/5KBT-WG82.

[13] *Federal Register & CFR Publications Statistics*, Office of the Fed. Register (May 2016), perma.cc/C7DG-JPRH.

[14] *Ibid.*

stances further justify reexamining *Seminole Rock* and *Auer*.

III. Section 3.156(c) entitles petitioner to retroactive benefits.

Petitioner presents the best interpretation of Section 3.156(c). He should therefore prevail on his claim for benefits retroactive to the date of his initial application.

Because the court of appeals did not independently evaluate the meaning of Section 3.156(c) (see Pet. App. 15a-17a), the Court may wish to remand for the court of appeals to do so in the first instance. See *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012).

If the Court reaches the issue, petitioner should prevail. Section 3.156 creates two mechanisms for the VA to revisit a past denial of disability benefits: reopening (38 C.F.R. § 3.156(a), which does not supply retroactive benefits, and reconsideration (*id.* § 3.156(c)), which does award retroactive benefits. See generally pages 12-13, *supra*. Petitioner is entitled to reconsideration.

The VA "will reconsider the claim" if three conditions are satisfied: first, the VA made an error by failing to "associate[] with the claims file" a government record that "existed" at the time of the original adjudication (38 C.F.R. § 3.156(c)(1)); second, the record is a "relevant official service department record[]" (*ibid.*); and third, the VA issues an "award * * * based all or in part on the records" that the VA previously failed to consider (*id.* § 3.156(c)(3)).

Petitioner satisfies each of Section 3.156(c)'s criteria. As to the first, petitioner's service records (in-

cluding his Combat History—Expeditions—Awards Record (J.A. 19)) existed at the time of the original adjudication. Pet. App. 34a. The VA, moreover, acknowledges that it did not consider these records because the VA never requested his file. *Id.* at 34a-35a.

As to the third, in granting petitioner benefits, the VA relied on the "evidence of record" (J.A. 52), which included petitioner's "DD Form 214," a "copy of service personnel record," and a "copy of citation for heroic participation in Operation Harvest Moon" (J.A. 51). The government admits that the VA's award was based in part on these records. See BIO 16 n.2 ("[P]etitioner's combat service was 'verified' based on the service department records.").

The only question, therefore, relates to the second element—whether these records are "relevant official service department records." The VA maintains that "official service records" qualify as "relevant" within the meaning of Section 3.156(c) only if they relate to the specific "basis" on which the original claim was denied. Pet. App. 43a. The Board of Veterans' Appeals appears to have understood Section 3.156(c) to require a counterfactual analysis: the VA must determine whether, if it had considered them, the records would have been "outcome determinative." *Id.* at 42a-43a.

There is no basis in the text for that narrow construction of "relevant." Instead, records are "relevant" if they support any element of a veteran's claim for benefits.

1. The regulation itself identifies that "relevant" is a broad term. It first states that the VA will reconsider a denied claim if it overlooked "relevant official service department records," and then goes on to ex-

plain that "[s]uch records include" "[s]ervice records that are related to a claimed in-service event." 38 C.F.R. § 3.156(c)(1)(i). This provision is not conditional: records relating to a veteran's "claimed in-service event" are *per se* "relevant" for purposes of this regulation. The records here fall within this specific description. No further inquiry is necessary or appropriate.[15]

2. The ordinary meaning of the term "relevant" further supports this interpretation. In normal usage, "relevant" means "bearing upon or relating to the matter in hand." *Webster's New Twentieth Century Dictionary* 1526 (2d ed. 1967). Federal Rule of Evidence 401 holds that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401.

To prevail, petitioner must present "credible supporting evidence that the claimed in-service stressor occurred." 38 C.F.R. § 3.304(f). Because petitioner's service records make this necessary element more probable, they are "relevant" records.

3. The VA asserts that the records must be relevant to the agency's original "basis of the denial"—not to the veteran's claim generally. Pet. App. 43a.

---

[15] In promulgating this rule, the VA "intend[ed] that this broad description of 'service department records' will also include unit records, such as those obtained from the Center for Research of Unit Records (CRUR) that pertain to military experiences claimed by a veteran." 70 Fed. Reg. at 35,388. As the VA explained, "[s]uch evidence may be particularly valuable in connection with claims for benefits for post traumatic stress disorder." *Ibid.* That is precisely the circumstance here.

But the VA has never identified a textual basis in the regulation for this limitation. See *id.* at 40a-43a; BIO 13-19.[16]

In fact, the text of the regulation refutes the government's contention. The reopening provision, Section 3.156(a), requires "material" evidence, which it defines as evidence that "relates to an unestablished fact necessary to substantiate the claim."

Under the VA's construction, "relevant" would mean the same thing as the defined term "material." But "where the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). See also *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2071 (2018) ("We usually 'presume differences in language like this convey differences in meaning.'").

This basic principle has special force here for two reasons. *First*, Section 3.156(c) specifies that it applies "notwithstanding paragraph (a) of this section." 38 C.F.R. § 3.156(c)(1). If "relevant" means the same thing as "material," then a veteran *would* have to

---

[16] In any event, petitioner's service records *are* relevant to the medical diagnosis of PTSD, one element of which is the demonstrated existence of a stressor. *DSM-5*, *supra*, at 271. As the VA explains, "one cannot make a PTSD diagnosis unless the patient has actually met the 'stressor criterion,' which means that he or she has been exposed to an event that is considered traumatic." Matthew J. Friedman, *PTSD History and Overview*, Nat'l Ctr. for PTSD, U.S. Dep't of Veterans Affairs, perma.cc/38K9-FQ8N. Proof of a stressor thus does bear directly on the likelihood that he suffers from PTSD.

satisfy the requirements of Section 3.156(a) to obtain reconsideration under Section 3.156(c), rendering this disclaimer meaningless.

Second, Section 3.156(c) previously *did* contain the "new and material" standard. In 2006, the VA amended the regulation to replace it with the broader term "relevant" evidence. See 71 Fed. Reg. 52,455. In proposing the rule, the VA intentionally "remove[d] the 'new and material' requirement." 70 Fed. Reg. at 35,388. The agency's decision to change the language confirms that the term "relevant" cannot here mean "material."

4. A related statute, 38 U.S.C. § 5103A, further supports this interpretation of "relevant official service department records." Section 5103A obligates the VA to "obtain[]" "relevant records pertaining to the claimant's active military, naval, or air service that are held or maintained by a governmental entity"—"if relevant *to the claim*." *Id.* § 5103A(c) (emphasis added). Section 5103A thus uses the term "relevant records" to encompass all records relevant "to the claim" brought by the veteran. Congress enacted Section 5103A in 2000 (Pub. L. No. 106-475, 114 Stat. 2096), and, in 2005, the VA proposed the current Section 3.156(c)—containing the term "relevant"—against that statutory backdrop (70 Fed. Reg. 35,388).

5. This construction is also consistent with the remedial purpose of Section 3.156(c)—to protect veterans against the loss of benefits due to an error by the VA. Rather than require the veteran to construct, and prevail upon, a speculative analysis regarding the impact a VA error had on an initial denial of benefits, Section 3.156(c) makes the veteran whole

when the VA issues an award based in part on evidence that the VA erroneously failed to consider the first time.

Two established canons of construction support this conclusion. The Court has long recognized that veterans have "been obliged to drop their own affairs to take up the burdens of the nation" (*Boone* v. *Lightner*, 319 U.S. 561, 575 (1943)), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service" (*Johnson* v. *Robison*, 415 U.S. 361, 380 (1974)). In view of their service, the Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011). See also *Hodge* v. *West*, 155 F.3d 1356, 1361-1362 (Fed. Cir. 1998) (applying canon in construing regulations). As the dissent to the denial of rehearing contended, this canon should resolve any remaining uncertainty. See Pet. App. 47a-54a.

In addition, legal instruments are typically construed against the drafter. Cf. Restatement (Second) of Contracts § 206 (1981). Here, the VA wrote the regulation at issue. It has the unique capacity to amend that regulation—something it has done before. See 71 Fed. Reg. 52,455. To the extent any doubt remains, the Court should construe the regulation to the financial detriment of the VA. Cf. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) ("Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt."); *United States* v. *Seckinger*, 397 U.S. 203, 210 (1970) (identifying "the general maxim that a

contract should be construed most strongly against the drafter"). If the VA wishes for a different interpretation, it may amend the regulation—subject to the requirements of the Administrative Procedure Act.

CONCLUSION

The Court should reverse the judgment entered below.

Respectfully submitted.

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW J. PINCUS
CHARLES A. ROTHFELD
E. BRANTLEY WEBB
ANDREW A. LYONS-BERG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Petitioner

JANUARY 2019

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
MATTHEW GUARNIERI
Assistant to the Solicitor General
MARK B. STERN
DANIEL AGUILAR
JOSHUA REVESZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Court should overrule *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement 2
A. Historical background 2
B. The present controversy 7
Summary of argument 11
Argument 14
I. *Seminole Rock* and *Auer* should be clarified and narrowed 15
A. *Seminole Rock* deference raises serious concerns 15
1. The basis for *Seminole Rock* deference is unclear 16
2. *Seminole Rock* deference is in tension with the APA's distinction between legislative and interpretive rules 22
3. Overly broad deference to agency interpretations can have harmful practical consequences 26
B. *Seminole Rock* deference should be subject to certain prerequisites 27
1. Courts should apply *Seminole Rock* deference only after exhausting all the traditional tools of interpretation and determining that the agency has reasonably interpreted any genuine ambiguity 28
2. Courts should apply *Seminole Rock* deference only if the agency's interpretation represents its fair, considered, and consistent judgment 30
II. Appropriately limited, *Seminole Rock* and *Auer* should not be overruled 34

Table of Contents—Continued: Page

A. *Stare decisis* counsels against overruling *Seminole Rock* deference 35
1. Congress could alter *Seminole Rock* deference 35
2. Overruling *Seminole Rock* deference would upset significant private reliance interests 37
3. Overruling *Seminole Rock* deference would impose practical costs on courts and regulated parties 39
B. Petitioner fails to offer sufficient special justifications for overruling, rather than narrowing, the decisions 44
III. The judgment should be affirmed 47
Conclusion 53
Appendix — Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

AT&T Co. v. *United States*, 299 U.S. 232 (1936) 16
Actavis Elizabeth LLC v. *United States FDA*, 625 F.3d 760 (D.C. Cir. 2010) 42
Alleyne v. *United States*, 570 U.S. 99 (2013) 36
Arizona v. *Gant*, 556 U.S. 332 (2009) 39
Auer v. *Robbins*, 519 U.S. 452 (1997) 5, 6, 12, 14, 30, 38
Blanding v. *DuBose*, 454 U.S. 393 (1982) 5
Blubaugh v. *McDonald*, 773 F.3d 1310 (Fed. Cir. 2014) 48, 50
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 30
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) ..... *passim*
Bowsher v. *Synar*, 478 U.S. 714 (1986) 45

Cases—Continued: Page

Bruesewitz v. *Wyeth LLC*, 562 U.S. 223 (2011) 19
Capital Network Sys., Inc. v. *FCC*, 28 F.3d 201 (D.C. Cir. 1994) 29
Chase Bank USA, N. A. v. *McCoy*, 562 U.S. 195 (2011) 6, 38
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 12, 19, 40
Christensen v. *Harris Cnty.*, 529 U.S. 576 (2000) 15, 28
Christopher v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012) 27, 30, 31, 38, 40
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 23
Citizens United v. *FEC*, 558 U.S. 310 (2010) 39
City of Arlington v. *FCC*, 569 U.S. 290 (2013) 20, 28, 45
Coeur Alaska, Inc. v. *Southeast Alaska Conservation Council*, 557 U.S. 261 (2009) 6
Decker v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597 (2013) 22, 29, 30
Ehlert v. *United States*, 402 U.S. 99 (1971) 5, 27, 31
FCC v. *Pottsville Broad. Co.*, 309 U.S. 134 (1940) 16, 17
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 19
FTC v. *Cement Inst.*, 333 U.S. 683 (1948) 46
Fidelity Fed. Sav. & Loan Ass'n v. *de la Cuesta*, 458 U.S. 141 (1982) 5
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 5, 21, 41, 43
Free Enter. Fund v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) 40
Gardebring v. *Jenkins*, 485 U.S. 415 (1988) 4, 15
*Global Tel*Link* v. *FCC*, 866 F.3d 397 (D.C. Cir. 2017) 29
Gonzales v. *Oregon*, 546 U.S. 243 (2006) 33, 34, 42

Cases—Continued: Page

Halliburton Co. v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) 44
Henderson ex rel. Henderson v. *Shinseki*, 562 U.S. 428 (2011) 7
Henry Schein, Inc. v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) 41
INS v. *Chadha*, 462 U.S. 919 (1983) 45
INS v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) 5, 31
INS v. *Stanisic*, 395 U.S. 62 (1969) 5
Jicarilla Apache Tribe v. *FERC*, 578 F.2d 289 (10th Cir. 1978) 34
Kennedy v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009) 31
Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) 6, 19, 31, 38, 42
Lyng v. *Payne*, 476 U.S. 926 (1986) 5
M. Kraus & Bros., Inc. v. *United States*, 327 U.S. 614 (1946) 17
Maine Med. Ctr. v. *Burwell*, 775 F.3d 470 (1st Cir. 2015) 31
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 46
Marcello v. *Bonds*, 349 U.S. 302 (1955) 46
Martin v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991) 15, 20, 21, 29, 33, 45
Maryland Gen. Hosp., Inc. v. *Thompson*, 308 F.3d 340 (4th Cir. 2002) 26
McMunn v. *Babcock & Wilcox Power Generation Grp., Inc.*, 869 F.3d 246 (3d Cir. 2017), cert. denied, 138 S. Ct. 1012 (2018) 43
Michigan v. *Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) 35, 37

Cases—Continued: Page

Mullins Coal Co. v. *Director, Officer of Workers' Comp. Programs*, 484 U.S. 135 (1987) 5, 18
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 25
NLRB v. *Noel Canning*, 134 S. Ct. 2550 (2014) 46
National Ass'n of Mfrs. v. *Department of Def.*, 138 S. Ct. 617 (2018) 19
National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 20, 33
Negusie v. *Holder*, 555 U.S. 511 (2009) 46
Northern Ind. Pub. Serv. Co. v. *Porter Cnty. Chapter of the Izaak Walton League of Am., Inc.*, 423 U.S. 12 (1975) 5, 31
Norwegian Nitrogen Prods. Co. v. *United States*, 288 U.S. 294 (1933) 16, 32
PLIVA, Inc. v. *Mensing*, 564 U.S. 604 (2011) 6, 38
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 35, 44
Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) 28, 40, 42
Payne v. *Tennessee*, 501 U.S. 808 (1991) 35, 36, 37
Pearson v. *Callahan*, 555 U.S. 223 (2009) 37
Pereira v. *Sessions*, 138 S. Ct. 2105 (2018) 28
Perez v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) ..... *passim*
Riegel v. *Medtronic, Inc.*, 552 U.S. 312 (2008) 6
Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 5, 25
Sears v. *Principi*, 349 F.3d 1326 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004) 47
Shalala v. *Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995) 5, 23, 43
Shinseki v. *Sanders*, 556 U.S. 396 (2009) 7

Cases—Continued: Page

Sierra Pac. Power Co. v. *United States EPA*, 647 F.2d 60 (9th Cir. 1981) 31
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 16, 28, 33
Smiley v. *Citibank (S.D.), N. A.*, 517 U.S. 735 (1996) 20
Stinson v. *United States*, 508 U.S. 36 (1993) 5
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) ..... *passim*
Thorpe v. *Housing Auth. of the City of Durham*, 393 U.S. 268 (1969) 4
Udall v. *Tallman*, 380 U.S. 1 (1965) 4
United States v. *Larionoff*, 431 U.S. 864 (1977) 4, 27, 29
United States v. *Mead Corp.*, 533 U.S. 218 (2001) ..... *passim*
Washington State Dep't of Soc. & Health Servs. v. *Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) 6

Constitution, statutes, regulations, and rules:

U.S. Const.:
Art. I 7
Art. I, § 1 45
Art. II, § 1, Cl. 1 45
Art. III, § 1 46
Administrative Procedure Act, ch. 324, 60 Stat. 237 (5 U.S.C. 551 *et seq.*, 701 *et seq.*) 3
§ 4(a), 60 Stat. 239 3
§ 4(b), 60 Stat. 239 3
§ 10(e), 60 Stat. 243 3
5 U.S.C. 551(4) 23, 1a
5 U.S.C. 553(b) 3, 23, 2a
5 U.S.C. 553(b)(A) 23, 2a
5 U.S.C. 553(c) 3, 23, 2a

Statutes, regulations, and rules—Continued: Page

5 U.S.C. 556-557 23
5 U.S.C. 706 ..... 3, 7, 17, 20, 22, 46, 3a
5 U.S.C. 706(2)(A) 32, 4a
Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 2(a), 105 Stat. 386 (38 U.S.C. 501) 36
Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 2
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 5
29 U.S.C. 213(a)(1) 5
Truth in Lending Act, 15 U.S.C. 1601 *et seq.* 38
15 U.S.C. 1640(f) 43
Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 8
15 U.S.C. 41 *et seq.* 45
15 U.S.C. 77s-77u 46
38 U.S.C. 301(b) 7
38 U.S.C. 301(c)(5) 7
38 U.S.C. 511(a) 7
38 U.S.C. 1110 7
38 U.S.C. 1131 7
38 U.S.C. 7101 *et seq.* 7
38 U.S.C. 7252 7
38 U.S.C. 7266 7
38 U.S.C. 7292(a) 7, 4a
38 U.S.C. 7292(d)(1) 7, 5a
47 U.S.C. 151 *et seq.* 46
21 C.F.R. 314.108(a) 42
29 C.F.R. (1996):
Section 541.1(f) 5

Regulations and rules—Continued: Page

Section 541.118(a) 5

38 C.F.R.:

Section 3.156(a) 8, 47, 51, 6a

Section 3.156(c) 14, 47, 50, 7a

Section 3.156(c)(1) ..... *passim*, 7a

Section 3.156(c)(2) 49, 8a

Section 3.156(c)(3) 9, 47, 49, 8a

Section 3.304(f) 8, 9a

Section 3.400(q)(2) 9, 47, 12a

Section 4.126 (1983) 8, 12a

Section 4.127 (1983) 8, 13a

Fed. R. Evid.:

Rule 401 49

Rule 401(b) 51

Miscellaneous:

Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) 18

American Heritage Dictionary of the English Language (5th ed. 2016) 49

Scott H. Angstreich, *Shoring up* Chevron: *A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49 (2000) 37

Black's Law Dictionary (10th ed. 2014) 49, 51

7 Fed. Reg. 7957 (Oct. 8, 1942) 2

84 Fed. Reg. 138 (Jan. 18, 2019) 8

84 Fed. Reg. 2449 (Feb. 7, 2019) 8

Miscellaneous—Continued: Page

Final Report of the Attorney General's Committee on Administrative Procedure (1941), *reprinted in Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) 17, 18, 41

Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 Va. L. Rev. 219 (1986) 17

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 20, 35, 39

Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1 (1983) 20

Frank C. Newman, *How Courts Interpret Regulations*, 35 Cal. L. Rev. 509 (1947) 16

13 *Oxford English Dictionary* (2d ed. 1989) 49

Richard J. Pierce, Jr.:

Distinguishing Legislative Rules from Interpretative Rules, 52 Admin. L. Rev. 547 (2000) 41

1 *Administrative Law Treatise* (5th ed. 2010) 26, 31

S. Rep. No. 418, 100th Cong., 2d Sess. (1988) 7

S. Rep. No. 752, 79th Cong., 1st Sess. (1945) 18

Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449 (2011) 23

U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 18, 43

In the Supreme Court of the United States

No. 18-15

JAMES L. KISOR, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 869 F.3d 1360. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 20a-25a) is unreported but is available at 2016 WL 337517.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2017. A petition for rehearing was denied on January 31, 2018 (Pet. App. 44a-46a). On April 24, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018, and the petition was filed on that date. The petition for a writ of certiorari was granted on December 10, 2018. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are reproduced in the appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

A. Historical Background

1. In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court addressed the meaning of a regulation issued under the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23. The regulation required manufacturers of building materials to charge prices no higher than (i) the "highest price which the seller *charged to a purchaser* of the same class for delivery * * * *during March, 1942*," (ii) the highest offering price "[i]f the seller made no such delivery during March 1942," or (iii) in the absence of deliveries or offers, an adjusted price based on other goods. 7 Fed. Reg. 7957, 7968-7969 (Oct. 8, 1942) (emphases added). The Seminole Rock & Sand Company delivered crushed stone in March 1942 under a 1941 contract, at a price of $0.60 per ton. *Seminole Rock*, 325 U.S. at 412. The Administrator of the Office of Price Administration, who had issued the regulation, contended that the first clause of the price regulation therefore applied. *Ibid.* The manufacturer, in contrast, contended that, under clause (i), "there must be *both a charge and a delivery* during March," and that the delivery at $0.60 per ton did not qualify because the "charge" for that delivery had occurred when the price was fixed in the 1941 contract. Resp. Br. at 8, *Seminole Rock*, *supra* (No. 914).

This Court held that clause (i) applied. That holding principally rested on the "plain words of the regulation." *Seminole Rock*, 325 U.S. at 414. As the Court "read the regulation," clause (i) "clearly applie[d]," *id.*

at 415, because, by its terms, "[t]he essential element bringing the rule into operation is * * * the fact of delivery during March," *id.* at 416. The Court further stated that, "[s]ince this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt," *id.* at 413-414, and "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation," *id.* at 414. It thus explained that "[a]ny doubts concerning this interpretation * * * are removed by reference to the administrative construction," as reflected in a public bulletin the Administrator had distributed, his report to Congress, and consistent practice in "the countless explanations and interpretations given to inquirers affected by this type of maximum price determination." *Id.* at 417-418.

2. In 1946, one year after *Seminole Rock*, Congress enacted the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237 (5 U.S.C. 551 *et seq.*, 701 *et seq.*). The APA has two provisions relevant to this case. First, Section 706 specifies the scope of judicial review of agency action, where available. Under that provision, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. 706; see § 10(e), 60 Stat. 243. Second, the APA generally requires agencies to engage in notice-and-comment procedures before promulgating a rule, but it exempts "interpretative rules" from those requirements. See 5 U.S.C. 553(b) and (c); § 4(a) and (b), 60 Stat. 239. The statute does not define "interpretative rule," but a hallmark of such a rule is that it "'do[es] not have the force and effect of law,'"

unlike a rule promulgated after notice and comment. *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (citation omitted).

3. This Court did not apply *Seminole Rock* again for two decades after the APA's enactment. In *Udall* v. *Tallman*, 380 U.S. 1 (1965), the Court addressed a dispute over the meaning of two orders concerning public lands in Alaska, see *id.* at 5, 17. The orders barred the "sale" or "other disposition" of the lands, but the Secretary of the Interior had interpreted them not to prohibit granting oil and gas leases. *Id.* at 19 (citation omitted). The Court deferred to the Secretary's interpretation, explaining that it "may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation" and "courts must therefore respect it." *Id.* at 4 (citing *Seminole Rock*, 325 U.S. at 413-414). The Court emphasized that the Secretary's interpretation had "been a matter of public record" and that "almost the entire area covered by the orders in issue has been developed, at very great expense, in reliance upon the Secretary's interpretation." *Id.* at 17-18.

In the ensuing years, the Court invoked *Seminole Rock* and *Tallman* with increasing frequency in a wide variety of contexts (as did the lower courts), including to defer to agency interpretations given privately or in litigation and sometimes without significant textual analysis of the underlying regulation. See, *e.g.*, *Thorpe* v. *Housing Auth. of the City of Durham*, 393 U.S. 268, 276 & nn.22-23 (1969) (deferring to an agency's view as expressed in letters to third parties); *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (stating that the Court "need not tarry" over the language of the regulations in light of *Seminole Rock*); *Gardebring* v. *Jenkins*,

485 U.S. 415, 429-430 (1988) (deferring to an agency's view as expressed for the first time in litigation).[1]

Of particular note, in *Auer* v. *Robbins*, 519 U.S. 452 (1997), this Court applied *Seminole Rock* to defer to the Secretary of Labor's understanding, expressed in an amicus brief filed in this Court, of a regulation implementing the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* The FLSA exempts employers from paying overtime to "bona fide executive, administrative, or professional" employees. 29 U.S.C. 213(a)(1). The Secretary's regulations defined those terms to require that the exempt employee be paid "on a salary basis." 29 C.F.R. 541.1(f) (1996). The regulations specified that an employee is paid "on a salary basis" only if the employee receives a regular "predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. 541.118(a) (1996).

In *Auer*, a group of police sergeants and a lieutenant contended that they were not paid on a salary basis (and

---

[1] See also, *e.g.*, *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 94-95 (1995); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Stinson* v. *United States*, 508 U.S. 36, 44-45 (1993); *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-190 (1991); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 358-359 (1989); *Mullins Coal Co.* v. *Director, Office of Workers' Comp. Programs*, 484 U.S. 135, 159 (1987); *Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 158 n.13 (1982); *Blanding* v. *DuBose*, 454 U.S. 393, 401 (1982) (per curiam); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Northern Ind. Pub. Serv. Co.* v. *Porter Cnty. Chapter of the Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975) (per curiam); *Ehlert* v. *United States*, 402 U.S. 99, 105 (1971); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969).

therefore were entitled to overtime) because "their compensation could be reduced for a variety of disciplinary infractions" under police department policy—making it "'subject to reduction'" based on the quality of their work, even if no reductions were actually made. *Auer*, 519 U.S. at 455, 460. The United States, participating in the case at this Court's invitation, explained that the Secretary interpreted the phrase "'subject to reduction'" to mean subject to reduction "as a practical matter," not merely theoretically, and therefore the police officers were not entitled to overtime. U.S. Amicus Br. at 21, *Auer*, *supra* (No. 95-897) (U.S. *Auer* Br.).

This Court deferred to the Secretary's interpretation as expressed in the amicus brief. *Auer*, 519 U.S. at 461. The Court stated that, "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Ibid.* (quoting, indirectly, *Seminole Rock*, 325 U.S. at 414). In the Court's view, that "deferential" standard was "easily met" because the phrase "'subject to' comfortably bears the meaning the Secretary assigns." *Ibid.* The Court rejected the petitioners' argument that deference to an amicus brief was unwarranted, explaining that "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462.[2]

---

[2] The Court has since applied *Auer* in numerous cases. See, *e.g.*, *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 613 (2011); *Chase Bank USA, N. A.* v. *McCoy*, 562 U.S. 195, 208-210 (2011); *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 274-275 (2009); *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 328 (2008); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007); *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 387-388 (2003).

B. The Present Controversy

1. The Department of Veterans Affairs (VA) administers a program to provide monetary benefits to veterans who become disabled as a result of their military service. See 38 U.S.C. 301(b), 1110, 1131; *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011). In adjudicating claims for benefits, the VA is charged with resolving "all questions of law and fact necessary to a decision." 38 U.S.C. 511(a). Claims for benefits are received and processed by a VA regional office, which renders an initial decision. See *Henderson*, 562 U.S. at 431. A veteran who is dissatisfied with the regional office's decision may seek de novo review by the Board of Veterans' Appeals (Board), a component of the VA. See *ibid.*; see also 38 U.S.C. 301(c)(5), 7101 *et seq.*

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court that has exclusive jurisdiction to review decisions of the Board. 38 U.S.C. 7252, 7266. Any party may in turn appeal to the Federal Circuit. 38 U.S.C. 7292(a). In reviewing the Veterans Court's decisions, the Federal Circuit has jurisdiction to "decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. 7292(d)(1).[3]

2. This case arises from administrative proceedings on petitioner's claim for veterans benefits for post-traumatic stress disorder (PTSD)—a disability for which VA regulations require a claimant to show, among other

---

[3] That language parallels 5 U.S.C. 706. This Court has indicated that, in using the same language, Congress intended the Federal Circuit's scope of review of "relevant questions of law" to be the same as under Section 706. See *Shinseki* v. *Sanders*, 556 U.S. 396, 406-407 (2009); cf. S. Rep. No. 418, 100th Cong., 2d Sess. 60 (1988).

things, "medical evidence diagnosing the condition." 38 C.F.R. 3.304(f); see 38 C.F.R. 4.126 (1983) (requiring a diagnosis to substantiate any claimed mental condition).

a. Petitioner served in the Marine Corps from 1962 to 1966 and fought in the Vietnam War. Pet. App. 2a, 4a. In 1982, he filed a claim for disability benefits for PTSD. J.A. 6-9. The evaluating psychiatrist at the time noted that petitioner was involved in a "major ambush which resulted in 13 deaths" in his company "during Operation Harvest Moon." J.A. 11-12. After considering these and other facts, the psychiatrist diagnosed him with "an emotional disturbance and personality disorder" but found that he "does not suffer from PTSD." J.A. 13, 14. In 1983, the VA regional office denied petitioner's PTSD claim because it was "not shown by evidence of record." J.A. 15 (capitalization altered); cf. 38 C.F.R. 4.127 (1983) ("[P]ersonality disorders will not be considered as disabilities[.]"). Petitioner filed a notice of disagreement, but the denial became final after he failed to perfect the appeal. Pet. App. 3a.

b. In 2006, petitioner moved to reopen his claim. Pet. App. 4a; J.A. 16-17. Under 38 C.F.R. 3.156(a), a claimant may "reopen a finally adjudicated claim by submitting new and material evidence."[4] Here, petitioner provided a 2007 psychiatric evaluation diagnosing him with PTSD (J.A. 29-40), and a VA examiner confirmed that

---

[4] On February 19, 2019, a revised version of 38 C.F.R. 3.156(a) took effect. See 84 Fed. Reg. 2449 (Feb. 7, 2019); 84 Fed. Reg. 138, 169 (Jan. 18, 2019). All citations in this brief refer to the version of the regulations in effect in 2018, unless otherwise noted. Section 3.156 was also amended in 2006, but those changes had no bearing on the proceedings. See Pet. App. 40a. Similarly, various statutory changes effective February 19, 2019, do not apply to this case. See Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105; 84 Fed. Reg. at 2449.

diagnosis. Pet. App. 4a. The VA regional office reviewed petitioner's submissions, along with the evidence submitted with his original claim, and granted his claim for benefits effective June 5, 2006—the date the agency had received petitioner's motion to reopen. J.A. 41-43; see 38 C.F.R. 3.400(q)(2) (providing that the effective date of an award based on new and material evidence other than service records, received after a final disallowance, is the "[d]ate of receipt of new claim or date entitlement arose, whichever is later").

c. Petitioner appealed to the Board to challenge the effective date of the award. J.A. 47-48. The Board observed that petitioner's original claim had been denied in 1983 "because he did not have a diagnosis of PTSD" at that time. Pet. App. 30a. It explained that June 5, 2006, the date of receipt of his motion to reopen his claim, was the "earliest effective date" allowable for his award of benefits. *Id.* at 33a.

The Board noted that, as an alternative to seeking to reopen his prior claim, petitioner might have instead sought reconsideration of his claim under 38 C.F.R. 3.156(c)(1). Pet. App. 39a-40a. That provision states that the VA will reconsider a claim after a final decision if it receives "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. 3.156(c)(1). If the VA reconsiders—rather than reopens—a claim, the effective date of the new award is generally "the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. 3.156(c)(3).

The Board concluded, however, that the only two additional service records at issue were not "relevant" to the original denial of his claim in 1983 and therefore did not warrant reconsideration. Pet. App. 42a. The first

document was a page of personnel records, which petitioner submitted in 2006, noting that he "participated in Operation 'Harvest Moon'" in 1965. J.A. 19 (capitalization altered); see J.A. 16. The second document, located by a VA official in 2007, was an "extract from the daily log" of petitioner's battalion, summarizing Operation Harvest Moon. J.A. 21-22. As noted above, however, in 1983 the evaluating psychiatrist was well aware of petitioner's participation in Operation Harvest Moon; petitioner's claim had instead been denied by the VA "because there was no diagnosis of PTSD." Pet. App. 42a.

3. The Veterans Court affirmed. Pet. App. 20a-25a. Petitioner contended that the Board had "failed to consider or apply the provisions of § 3.156(c)." *Id.* at 23a (citation omitted). The court explained, however, that the Board had considered Section 3.156(c)(1) and had found the newly submitted service department records "were not relevant" to the denial of his claim in 1983. *Id.* at 23a-24a. The documents would not have changed "the outcome of the" agency's 1983 decision, which was based on the lack of "a diagnosis of PTSD," not on any dispute about whether petitioner had "engaged in combat with the enemy during service." *Id.* at 24a (brackets and citation omitted).

4. The court of appeals also affirmed. Pet. App. 1a-19a. Petitioner contended that the Board had mistakenly interpreted the term "relevant official service department records" in 38 C.F.R. 3.156(c)(1) to mean "records that countered the basis of the prior denial." Pet. App. 12a (citation omitted). In his view, prior service records are "relevant" within the meaning of the regulation as long as they are probative of "any fact that is of consequence to the determination of the action." *Id.* at 13a (citation and emphasis omitted). The records at

issue here, he argued, were relevant to other criteria for establishing a compensable disability. See *ibid.*

The court of appeals rejected petitioner's reading of the VA's regulation. See Pet. App. 14a-19a. After reciting the standard for *Seminole Rock* deference, see *id.* at 15a, the court stated that it found the term "relevant" to be ambiguous because the regulation "does not specify whether 'relevant' records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard." *Id.* at 15a; see *id.* at 16a-17a. In light of that perceived ambiguity, the court viewed the "only remaining question" to be "whether the Board's interpretation of the regulation is 'plainly erroneous or inconsistent' with the VA's regulatory framework." *Id.* at 17a (citation omitted). The court concluded that the Board's interpretation was not plainly erroneous. *Ibid.* It also concluded that the two additional records at issue were not relevant under that interpretation of the regulation. *Id.* at 17a-18a. Indeed, the additional records "detailing his participation in Operation Harvest Moon were superfluous to the information already existing in his file," including the 1983 psychiatric report that "expressly recounted how [petitioner] experienced" a major ambush during that operation. *Ibid.* The court also noted that petitioner himself "d[id] not urge that the 2006 records provide[d]" the missing diagnosis. *Id.* at 18a.

The court of appeals denied rehearing en banc, over the dissent of three judges. Pet. App. 44a-46a.

SUMMARY OF ARGUMENT

I. The doctrine of judicial deference to agency interpretations of ambiguous regulations announced in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410

(1945), and applied in *Auer* v. *Robbins*, 519 U.S. 452 (1997), should be clarified and narrowed.

A. The doctrine raises significant concerns. First, its basis is unclear. It is not well grounded historically; this Court has not articulated a consistent rationale for it; and it is more difficult to justify on the basis of implicit congressional intent than *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Second, *Seminole Rock* deference is in tension with the APA's distinction between legislative and interpretive rules. Interpretive rules, unlike legislative rules, do not carry the force and effect of law and are exempt from notice-and-comment procedures. When a reviewing court gives controlling weight to an interpretive rule under *Seminole Rock*, it arguably treats the interpretive rule as though it were a legislative rule. *Seminole Rock* deference can also cause practical hardship to regulated parties.

B. In light of these substantial concerns, the Court should impose and reinforce significant limits on *Seminole Rock* deference. *Seminole Rock* deference is inappropriate if, after applying all the traditional tools of construction, a reviewing court determines that the agency's interpretation is unreasonable—*i.e.*, not within the range of reasonable readings left open by a genuine ambiguity in the regulation. A more searching application of that inquiry would obviate any occasion for *Seminole Rock* deference in many cases. And even when that rigorous predicate is met, a reviewing court should defer to the agency's interpretation only if the interpretation was issued with fair notice to regulated parties; is not inconsistent with the agency's prior views; rests on the agency's expertise; and represents the agency's considered view, as distinct from the views of mere field officials or other low-level employees.

II. As appropriately limited, however, *stare decisis* counsels against overturning *Seminole Rock* and *Auer* in their entirety.

A. Several reasons counsel against altogether discarding *Seminole Rock* deference. First, Congress remains free to amend the APA and alter *Seminole Rock* if it wishes. Second, *Seminole Rock* deference has been a feature of administrative law for decades and has been invoked in many decisions. Regulated parties have reasonably relied on those settled precedents to arrange their affairs. Overruling *Seminole Rock* deference would thus upset private reliance interests to a greater degree than narrowing it. Third, overruling *Seminole Rock* deference would impose practical costs by eliminating or lessening the benefits of the doctrine. *Seminole Rock* deference promotes political accountability for regulatory policy and national uniformity in federal law. It also respects the scientific and technical expertise of agencies and, when appropriately limited, fosters certainty and predictability by making agency guidance more reliable for regulated parties.

B. Petitioner has not identified sufficient special justifications to warrant overruling *Seminole Rock* deference. The tension between the APA and *Seminole Rock* has existed for many years. The Court has applied the doctrine on numerous occasions, and petitioner does not argue the doctrine has proven unworkable. Petitioner's contention that the doctrine violates separation-of-powers principles is also incorrect. *Seminole Rock* deference does not result in any combination of legislative and judicial powers in the constitutional sense, because when an executive agency both makes and interprets rules, the agency exercises only executive power.

III. The judgment should be affirmed. Applying *Seminole Rock* to the regulation at issue, 38 C.F.R. 3.156(c), was unnecessary. The text, structure, and purpose of Section 3.156(c) make unambiguously clear that, to warrant reconsideration of the agency's previous denial of a claim for benefits, additional service records must be "relevant" to the basis for the agency's previous denial. The two additional service records at issue here did not meet that standard and indeed were irrelevant. The agency denied petitioner's prior claim in 1983 because he lacked a diagnosis of PTSD. It is undisputed that the two additional records at issue here did not speak to that dispositive defect in petitioner's claim; they instead merely confirm his combat experience, which was never in dispute.

ARGUMENT

Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997), have come to stand for a degree of deference to agencies that lacks a clear historical basis and that raises significant concerns under the APA. In light of those concerns, the Court should impose and reinforce limits on *Seminole Rock* deference to cabin the doctrine's excesses. Appropriately limited in those ways, *Seminole Rock* and *Auer* should not be overruled altogether. Deference has governed judicial review of agency interpretations of regulations for more than half a century (including the entirety of the APA's existence). Overruling *Seminole Rock* and *Auer* could call into question the thousands of precedents that rely on them, including many of this Court's decisions, to a greater degree than narrowing them; private parties may have relied on those decisions to order their affairs. *Seminole Rock* deference also has

practical benefits, including promoting political accountability for regulatory policy and national uniformity in federal law.

I. *SEMINOLE ROCK* AND *AUER* SHOULD BE CLARIFIED AND NARROWED

Under *Seminole Rock* deference in its current form, "when the language of [a] regulation is ambiguous," *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 588 (2000), a reviewing court gives "controlling weight" to an administrative interpretation of the regulation unless the interpretation "is plainly erroneous or inconsistent with the regulation," *Seminole Rock*, 325 U.S. at 414; cf. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (describing *Seminole Rock* as requiring deference "to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language'") (quoting *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988)). This Court has stated that affording deference to an agency's interpretation respects the agency's "historical familiarity" with the regulations and its "policymaking expertise." *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 153 (1991). But this Court has never reconciled *Seminole Rock* deference with the APA or with pre-APA practice. *Seminole Rock* deference has also been applied in ways that raise practical concerns and that suggest the doctrine should be limited in several significant respects.

A. *Seminole Rock* Deference Raises Serious Concerns

Deference under *Seminole Rock* raises two concerns. First, the basis for *Seminole Rock* deference is unclear, and this Court has not examined its consistency

with the APA. The doctrine lacks a well-established basis in pre-APA practice and is difficult to fully justify on the basis of an agency's insight into its own intentions or congressional delegation. Second, *Seminole Rock* deference is in tension with the APA's critical distinction between legislative and interpretive rules.

1. The basis for Seminole Rock *deference is unclear*

a. Before *Seminole Rock*, this Court had deferred on occasion to an agency's interpretation of its own regulations. See, *e.g.*, *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 143 n.6 (1940); *AT&T Co.* v. *United States*, 299 U.S. 232, 241-242 (1936); *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 324-325 (1933). But "few cases" addressed the issue, and this Court did not defer in some instances where a *Seminole Rock*-type rule would have required doing so. Frank C. Newman, *How Courts Interpret Regulations*, 35 Cal. L. Rev. 509, 520-522 (1947).

The lack of a clear historical basis for *Seminole Rock* is evident in the decision itself. The Court did not invoke any of its prior decisions in announcing that an agency's interpretation should be given "controlling weight" unless "plainly erroneous." 325 U.S. at 414. For his part, the Administrator of the Office of Price Administration (whose regulation was at issue) had argued for deference primarily on the basis of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), decided just one year earlier. There, the Court had deferred to an agency's interpretation of a statute while emphasizing that the agency's interpretation was "not controlling" and received deference because it had the "power to persuade." *Id.* at 140. In *Seminole Rock*, the Administrator argued that "[t]he weight to be given to his construction of his own regulations should obviously be much

greater; for then he is explaining his own intention, not that of Congress." Pet. Br. at 20, *Seminole Rock*, *supra* (No. 914). But the Administrator did not argue that his interpretation was binding. See *id.* at 20-21 (observing that *Pottsville Broadcasting*, *supra*, had stated that an administrative interpretation of a regulation may be "'binding upon the courts,'" but arguing that the Court need not "go that far here") (citation omitted).

It is therefore far from clear that the Congress that enacted the APA would have been familiar with *Seminole Rock* deference as that doctrine now exists. To be sure, *Seminole Rock* was decided a year before the enactment of the APA. See p. 3, *supra*. But the decision post-dated much of the reform process that led to the APA, including the multi-volume study of administrative procedure commissioned by the Attorney General. See *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), *reprinted in Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) (*APA Final Report*); see also Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 Va. L. Rev. 219, 224-226 (1986). No discussion of the decision appears in the legislative record. And in a criminal case decided a month before the APA's enactment, this Court interpreted a price-control regulation without relying on *Seminole Rock* or suggesting that any deference to the Administrator's construction was warranted. See *M. Kraus & Bros., Inc.* v. *United States*, 327 U.S. 614, 621-623 (1946).

Accordingly, although the APA's scope-of-review provision—now found in relevant part at 5 U.S.C. 706—was understood to be a "restatement" of existing law, it is not clear that Congress was restating *Seminole Rock*

deference as that doctrine is understood today. *Administrative Procedure Act: Legislative History*, S. Doc. No. 248, 79th Cong., 2d Sess. 39 (1946); accord S. Rep. No. 752, 79th Cong., 1st Sess. 38 (1945) ("restates the law governing judicial review"); *id.* at 44 ("declares the existing law"); U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (*APA Manual*) ("restates the present law"). Existing law at the time permitted judicial review, "in some instances at least, [to] be limited to the inquiry whether the administrative construction is a permissible one," as the Attorney General's committee reported after its exhaustive study of pre-APA administrative procedure. *APA Final Report* 78; see *id.* at 90-91 ("[W]here the statute is reasonably susceptible of more than one interpretation, the court may accept that of the administrative body."). But permitting some degree of deference to an agency did not require affording its interpretations of its regulations "controlling" weight.

b. Nor has this Court articulated a consistent rationale for *Seminole Rock*. At times, the Court has suggested that *Seminole Rock* deference is based on an agency's superior insight into the intention behind its regulations—as the Administrator himself argued in *Seminole Rock*, see pp. 16-17, *supra*. See, *e.g.*, *Mullins Coal Co.* v. *Director, Office of Workers' Comp. Programs*, 484 U.S. 135, 159 (1987) ("In the end, the Secretary's view is * * * strongly supported by the fact that Labor wrote the regulation."). That intentionalist theory may be relevant where an interpretation is issued contemporaneously with the regulation, including, for example, as part of a final rule's published preamble. But beyond that, it is in significant tension with the Court's interpretive approach in other contexts, where the Court's "inquiry begins with the * * * text" of a law

and "ends there as well" when the text is clear. *National Ass'n of Mfrs.* v. *Department of Defense*, 138 S. Ct. 617, 631 (2018) (citation omitted). And even when legislative history is relevant, the Court does not typically rely on post-enactment statements of what a previously enacted statute meant. See, *e.g.*, *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history * * * is not a legitimate tool of statutory interpretation.").

An intentionalist theory also fails to explain the breadth of *Seminole Rock* deference as currently applied. This Court has deferred to an agency's interpretation of a regulation even when the interpretation is rendered decades after a rule is promulgated, and even when the interpretation is inconsistent with the agency's prior views—both circumstances in which deference cannot necessarily be justified on the basis of the agency's insight into its own intention at the time of the underlying rulemaking. See, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170-171 (2007) (deferring to an agency's interpretation despite inconsistency); *Auer*, 519 U.S. at 461-462 (deferring to an agency's 1996 interpretation of a regulation adopted in 1954); cf. U.S. *Auer* Br. 6 (regulatory history).

c. This Court has also, at times, sought to ground *Seminole Rock* in the same kind of theory underlying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It is not clear, however, that the *Chevron* rationale applies to deference to an agency's construction of its own regulations.

This Court has stated that the *Chevron* framework rests on a presumption that "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); see

National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) ("*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'") (quoting *Smiley* v. *Citibank (S.D.), N. A.*, 517 U.S. 735, 740-741 (1996)). As a corollary, when an agency fails to use the procedures Congress intended the agency to use to resolve a statutory ambiguity, *Chevron* deference generally does not apply. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001).

Thus, when a reviewing court defers to an agency's interpretation under *Chevron*, it can be viewed as having "decide[d] [the] relevant question[] of law," 5 U.S.C. 706, by determining that the statute delegates discretion to the agency to resolve the ambiguity. See *City of Arlington* v. *FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) ("We do not ignore [Section 706's] command when we afford an agency's statutory interpretation *Chevron* deference; we respect it."); cf. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 622 & n.58 (1996) (Manning); Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 27-28 (1983). In deciding legal questions, the court must take account of Congress's implicit instruction to review the agency's interpretation with a degree of deference.

In *Martin*, *supra*, this Court suggested that *Seminole Rock* deference can be viewed as resting on a similar presumption about congressional intent. There, the Court considered whether, in a dispute over the meaning

of workplace-safety regulations, a reviewing court should defer to the views of the Secretary of Labor or the Occupational Safety and Health Review Commission. 499 U.S. at 150. Under the statutory scheme, the Secretary promulgates the regulations, but the Commission adjudicates disputes about them. See *id.* at 147-148. The Court sided with the Secretary, reasoning that in authorizing the Secretary to make rules, Congress intended also to "delegate[] interpretive lawmaking power to the [Secretary] rather than to [a] reviewing court." *Id.* at 153.

The Court explained that "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151 (citing *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566, 568 (1980)). The Court further explained that the Secretary has "identifiable structural advantages" in interpreting the regulations—such as "historical familiarity" with the scheme; "policymaking expertise" developed over time; and the ability, as a "single administrative actor," to be "politically 'accountable for the overall implementation'" of the regulatory program. *Id.* at 152-153 (citation omitted); cf. *Thomas Jefferson Univ.*, 512 U.S. at 512.

Martin thus suggests that if a regulation that Congress has authorized an agency to promulgate is ambiguous, Congress should generally be presumed to have intended the agency's interpretation of the regulation to govern—*i.e.*, that the agency's "delegated lawmaking powers" imply also a presumptive "power" to issue "authoritative[]" interpretations. 499 U.S. at 151. And if Congress has conferred such an implied authority on an

agency, a reviewing court could be viewed as "decid[ing] [the] relevant question[] of law," 5 U.S.C. 706, in determining that Congress has instructed the court to review the agency's interpretation deferentially.

Justifying *Seminole Rock* deference on the basis of such a presumption, however, is more difficult than with respect to *Chevron* for reasons the Court did not address in *Martin*. Under *Chevron*, an ambiguity in a statute is understood to be an implicit delegation from Congress to the agency to make a policy judgment within the bounds of any statutory ambiguity. But an ambiguity in an agency's own regulation is not of Congress's making. Cf. *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part). *Martin* did not ground its presumption of congressional intent on statutory ambiguity, but rather more generally on the Secretary's delegated rulemaking authority. See 499 U.S. at 151-153. Moreover, as discussed below, Congress generally required notice-and-comment procedures under the APA for rules that carry the force of law. It is therefore far from clear that Congress intended courts to accord binding deference to interpretive rules not promulgated through that process.

2. Seminole Rock *deference is in tension with the APA's distinction between legislative and interpretive rules*

Seminole Rock deference is also in tension with the APA's distinction between legislative rules, which have the force and effect of law, and interpretive rules, which do not. Affording *Seminole Rock* deference to an interpretive rule appears to undercut that distinction.

a. The APA generally "prescribes a three-step procedure" for rulemaking. *Perez* v. *Mortgage Bankers*

Ass'n, 135 S. Ct. 1199, 1203 (2015); cf. 5 U.S.C. 553(c), 556-557 (separate procedures for formal rulemaking). First, the agency must publish a "notice of proposed rule making * * * in the Federal Register." 5 U.S.C. 553(b). Second, "[a]fter notice" to the public, the agency must "give interested persons an opportunity to participate in the rule making through the submission of" comments. 5 U.S.C. 553(c). Third, the agency must "consider[] * * * the relevant matter presented" in comments and "incorporate in the rules adopted a concise general statement of their basis and purpose." *Ibid.* "Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Mortgage Bankers*, 135 S. Ct. at 1203 (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-303 (1979)).

The APA, however, exempts some rules from notice-and-comment requirements—including "interpretative rules." 5 U.S.C. 553(b)(A). The statute does not define the term "interpretative rule," or the more common variant, "interpretive rule." See *Mortgage Bankers*, 135 S. Ct. at 1204 & n.1. But a "critical feature of interpretive rules" is that, unlike legislative rules, interpretive rules "'do not have the force and effect of law.'" *Id.* at 1204 (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Their purpose is to "advise the public of the agency's construction of the statutes and rules which it administers." *Ibid.* (citation omitted).

b. *Seminole Rock* deference applies to guidance documents that would qualify as interpretive rules under the APA. See 5 U.S.C. 551(4) (defining a "'rule'" to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to * * * interpret * * * law or policy"); see also Matthew C. Stephenson & Miri Pogoriler, Seminole

Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449, 1483-1484 (2011) (noting that interpretive rules may "take the form of published guidance manuals," "letters to interested parties," "ad hoc memoranda or announcements," or "speeches by agency officials"; collecting examples). Those interpretive rules typically have not been subject to notice-and-comment rulemaking, with its attendant procedural safeguards and opportunity for public participation.

When a reviewing court affords *Seminole Rock* deference to an agency's interpretive rule, doing so arguably treats the interpretive rule as though it were a legislative rule. The agency is empowered to announce an interpretation of a legislative rule to which a reviewing court generally must defer, even if it does not reflect what the court would conclude is the best interpretation of the legislative rule. As a practical matter, giving *Seminole Rock* deference to an agency's interpretive rule means that the interpretive rule itself is specifying how regulated parties must conduct themselves in order to comply with the agency's legislative rule. Cf. *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) ("[I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference."). And it is anomalous that interpretive rules about a *statute's* meaning are generally accorded no *Chevron* deference, see *Mead Corp.*, 533 U.S. at 229-231, whereas interpretive rules about a *regulation's* meaning are accorded *Seminole Rock* deference, even though the agency is

fully empowered to amend the regulation in accordance with notice-and-comment procedures.[5]

To be sure, the Court disagreed with this argument in dicta in a footnote in *Mortgage Bankers*, 135 S. Ct. at 1208 n.4, which held that an agency need not use notice-and-comment procedures to revise or amend an interpretive rule, *id.* at 1206. The regulated party argued that notice-and-comment procedures should be required for significant revisions to interpretive rules because "interpretive rules have the force of law" under *Auer*. *Id.* at 1208 n.4. The Court responded that "[e]ven in cases where an agency's interpretation receives *Auer* deference, * * * it is the *court* that ultimately decides whether a given regulation means what the agency says," and "*Auer* deference is not an inexorable command in all cases." *Ibid.* (emphasis added); cf. U.S. Reply Br. at 11-14, *Mortgage Bankers*, *supra* (No. 13-1041).

Those statements, however, were not necessary to the Court's holding, which instead turned on the APA's "categorical" exemption of all interpretive rules from notice-and-comment requirements. *Mortgage Bankers*,

---

[5] When an agency interprets its regulations in adjudication (as the VA did here), the agency's interpretation can also receive *Seminole Rock* deference. See, *e.g.*, *Thomas Jefferson Univ.*, 512 U.S. at 510-511, 512; *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 358-359 (1989). Deferring to an agency's interpretation in those circumstances does not give any interpretive rule the effect of a legislative rule, but it presents the related concern that the agency may adopt an interpretation different from what a court would conclude is the best interpretation, without going through notice-and-comment procedures to amend the regulation. Accordingly, although the choice between adjudication and rulemaking is committed to the agency's discretion, see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), the limits that the government urges the Court to impose or reinforce on *Seminole Rock* deference should apply generally to adjudications as well as to interpretive rules.

135 S. Ct. at 1206. The statements are also difficult to square with the logic of *Mead Corp.*, which held that whether Congress intended a given agency action "to carry the force of law" should be the guiding consideration in whether *Chevron* deference applies to the agency action. 533 U.S. at 221. The fact that a reviewing court "ultimately decides" whether to defer to an agency's interpretation, *Mortgage Bankers*, 135 S. Ct. at 1208 n.4, does not eliminate the seeming incongruity of giving controlling weight to an interpretive rule that is not meant to carry the force of law.

3. Overly broad deference to agency interpretations can have harmful practical consequences

Although agencies can use interpretive guidance to provide desirable clarity and certainty, often at the request of regulated parties, *Seminole Rock* deference can discourage agencies from engaging in notice-and-comment rulemaking. Even when a reviewing court declines to defer to the agency's interpretive guidance, regulated parties can be harmed by the uncertainty and costs that litigation over the validity of the interpretation may entail. See, *e.g.*, *Maryland Gen. Hosp., Inc.* v. *Thompson*, 308 F.3d 340, 343-346 (4th Cir. 2002) (rejecting an agency's interpretation of a Medicare reimbursement regulation, to which other courts had deferred, as inconsistent with the plain meaning of the regulation); 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.11, at 538-540 (5th ed. 2010) (Pierce) (collecting examples of agency interpretations rejected by reviewing courts as efforts to change the meaning of a legislative rule).

Seminole Rock deference has also sometimes operated to short-circuit judicial review by leading courts to

dispense with careful scrutiny of the text of a regulation. See, *e.g.*, *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (stating that the Court "need not tarry" over the language of the regulations because the agency's interpretation was controlling); *Ehlert* v. *United States*, 402 U.S. 99, 105 (1971) (declining to "take sides" in an interpretive debate because the agency's "reasonable, consistent[]" interpretation is controlling); pp. 47-50, *infra* (discussing the Federal Circuit's decision to apply *Seminole Rock* deference in this case after only cursory examination of the regulatory text). In practice, *Seminole Rock* has come to mean such a broad degree of deference to agency interpretations that courts have not always carefully examined whether there is genuine regulatory ambiguity in the first place.

B. *Seminole Rock* Deference Should Be Subject To Certain Prerequisites

Because *Seminole Rock* does not clearly flow from pre-APA history or the APA, the Court should impose and reinforce limitations on *Seminole Rock* deference—as it did for *Chevron* in *Mead Corp.*, see 533 U.S. at 229-231. *Seminole Rock* deference is appropriate only if the agency has reasonably interpreted any ambiguity; that standard should be no more solicitous to the agency than *Chevron*. And even if the regulation is ambiguous, the agency's interpretation should be given *Seminole Rock* deference only if certain threshold requirements are satisfied, including that the interpretation is not inconsistent with the agency's prior interpretations and otherwise provides regulated parties with fair notice, is sufficiently grounded in the agency's expertise, and represents the views of the agency itself (not merely low-level employees). Those limits are consistent with this Court's recent approach. See *Christopher* v.

SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (describing *Auer* deference as a "general rule" that "does not apply in all cases" and that "is undoubtedly inappropriate" in some circumstances). When those requirements are not met, the agency's interpretation is entitled to deference only to the extent it has the "power to persuade." *Skidmore*, 323 U.S. at 140; see *Christopher*, 567 U.S. at 159.

1. Courts should apply Seminole Rock *deference only after exhausting all the traditional tools of interpretation and determining that the agency has reasonably interpreted any genuine ambiguity*

Seminole Rock deference does not apply unless "the language of the regulation is ambiguous." *Christensen*, 529 U.S. at 588; see *Seminole Rock*, 325 U.S. at 414 (contemplating deference only "if the meaning of the words used is in doubt"). In determining whether a regulation is ambiguous, a reviewing court should—as in the *Chevron* context—apply all "the ordinary tools" of statutory and regulatory construction, including any canons of construction appropriate in the circumstances. *City of Arlington*, 569 U.S. at 296. A regulation is ambiguous in the relevant sense only if, "carefully considered" in light of all those tools, the regulation nonetheless "can yield more than one reasonable interpretation." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting). A regulation is not ambiguous merely because "discerning the only possible interpretation requires a taxing inquiry." *Ibid.*; cf. *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (criticizing "reflexive deference").

To be sure, some genuine ambiguity is inevitable—for example, because an agency cannot foresee all the future applications of a rule at the time it issues the

rule. But many seeming ambiguities can be resolved by careful consideration of the text, structure, purpose, and history of a regulation. See, *e.g.*, *Decker*, 568 U.S. at 623-626 (Scalia, J., concurring in part and dissenting in part) (demonstrating how the regulation at issue there arguably was not ambiguous under the relevant canons of construction). A rigorous application of the tools of construction would obviate any need for *Seminole Rock* deference in many cases. Courts should instead strive where possible to give effect directly to an agency's legislative rule—the agency action that, under the APA, carries the force and effect of law.

Even if a reviewing court determines that an agency's regulation is ambiguous after exhausting all the traditional tools of construction, the court should defer to the agency's interpretation only if the agency's interpretation is "reasonable" in the sense that it falls within the zone of ambiguity identified. *Thomas Jefferson Univ.*, 512 U.S. at 515; see *Martin*, 499 U.S. at 150-151. At times, this Court has suggested that agency interpretations receive greater deference in this context than under *Chevron*. See, *e.g.*, *Larionoff*, 431 U.S. at 873; *Seminole Rock*, 325 U.S. at 414; cf. *Capital Network Sys., Inc.* v. *FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994) (understanding *Seminole Rock* to require "even greater deference" than *Chevron*). The Court should lay to rest any doubt and make clear that an agency's interpretation must be *reasonable*—*i.e.*, it must be one of the reasonable readings to which the regulation is susceptible even after applying the traditional tools of construction. Cf. *Global Tel*Link* v. *FCC*, 866 F.3d 397, 419 (D.C. Cir. 2017) (Silberman, J., concurring) (urging a "muscular" approach to the requirement under *Chevron* that an agency's interpretation be reasonable).

2. *Courts should apply* Seminole Rock *deference only if the agency's interpretation represents its fair, considered, and consistent judgment*

Seminole Rock deference is also unwarranted if "there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" *Christopher*, 567 U.S. at 155 (quoting *Auer*, 519 U.S. at 462). For example, a reviewing court need not defer to an interpretation that is merely a "*post hoc* rationalization[]" advanced in litigation challenging the agency action. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (citation omitted). The Court has not comprehensively set forth the circumstances in which an agency's interpretation should be viewed as not reflecting "the agency's fair and considered judgment." *Christopher*, 567 U.S. at 155 (citation omitted). But in the *Chevron* context, the Court has looked for indicia warranting such deference—such as relatively formal administrative procedures, like notice-and-comment rulemaking or adjudication. See *Mead Corp.*, 533 U.S. at 230. The Court should clarify that similar safeguards constrain the application of *Seminole Rock* deference.

a. *Consistency and fair notice.* This Court has recognized that "when [an] agency's interpretation conflicts with a prior interpretation," that inconsistency itself may suggest that the agency's present interpretation is not in fact its "'fair and considered judgment.'" *Christopher*, 567 U.S. at 155 (citing *Thomas Jefferson Univ.*, 512 U.S. at 515). The Court has also stressed administrative consistency as supporting deference. See, *e.g.*, *Decker*, 568 U.S. at 614 (concluding that an agency's "consistent" interpretation of its regulation, with "no indication that

[the agency's] current view is a change from prior practice," was "another reason" to accord deference); *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-190 (1991) ("[A]n agency's reasonable, *consistently held* interpretation of its own regulation is entitled to deference.") (emphasis added); *Northern Ind. Pub. Serv. Co.* v. *Porter Cnty. Chapter of the Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975) (per curiam) (deferring to a "consistently applied administrative interpretation") (quoting *Ehlert*, 402 U.S. at 105); *Seminole Rock*, 325 U.S. at 418 (deferring to a "consistent administrative interpretation"). The Court has, however, deferred on occasion to an agency's interpretation notwithstanding some inconsistency. See, *e.g.*, *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 & n.7 (2009); *Long Island Care*, 551 U.S. at 170-171; see also, *e.g.*, *Maine Med. Ctr.* v. *Burwell*, 775 F.3d 470, 480-481 (1st Cir. 2015); *Sierra Pac. Power Co.* v. *United States EPA*, 647 F.2d 60, 65 (9th Cir. 1981). *Seminole Rock* deference should be limited to interpretations that are not inconsistent with the agency's prior views.

Even when there is no express inconsistency, *Seminole Rock* deference should not apply when the agency adopts a novel interpretation that disrupts settled expectations based on agency acquiescence or contrary practice. In *Christopher*, for example, the Court declined to defer to an agency's interpretation that would have "impose[d] potentially massive liability" on regulated parties "for conduct that occurred well before that interpretation was announced." 567 U.S. at 155-156; see Pierce § 6.11, at 543-553 (additional examples of deference being denied for lack of fair notice). The interpretation at issue in *Christopher* followed a long period in

which the agency had appeared to acquiesce in a contrary interpretation, and the Court declined to defer to the agency's apparently new interpretation in those circumstances. See 567 U.S. at 158; see also *Mortgage Bankers*, 135 S. Ct. at 1208 n.4. Limiting *Seminole Rock* deference in the face of inconsistency would also better align the doctrine with pre-APA practices of judicial review, which stressed consistency (and judicial reluctance to upset the settled expectations that such consistency generates) as a reason for deference. See, *e.g.*, *Norwegian Nitrogen Prods.*, 288 U.S. at 315 (stating that a "consistent" administrative practice is entitled to deference). Relatedly, *Seminole Rock* deference to interpretations in guidance documents or adjudicatory opinions should be limited to such pronouncements that are readily available through familiar, official agency channels and thus that provide regulated parties with fair notice.

Finally, such limitations would help mitigate the tensions between *Seminole Rock* deference and the APA, see pp. 22-26, *supra*, because they would encourage agencies to effect significant policy changes through notice-and-comment procedures rather than guidance documents.[6] To be sure, an agency often has good reason to revise its interpretation of a legislative rule—*e.g.*, in light of additional experience with administering the rule, or because of changing market conditions—and the APA permits an agency to do so without notice-and-comment rulemaking, as long as the agency has a reasoned basis for the revision. See 5 U.S.C. 706(2)(A); *Mortgage Bankers*, 135 S. Ct. at 1209. Thus, the

---

[6] Limiting *Seminole Rock* deference in this manner would also address petitioner's criticism (Br. 39-40, 52) that the doctrine is prone to abuse after changes in an agency's political leadership.

agency's authority to revise, alter, or reconsider its interpretation of its regulations is not at issue. The only question is whether the agency's new interpretation should receive binding deference. It should not when its interpretation is inconsistent with its prior views or fails to provide regulated parties with fair notice. In those circumstances, if agencies want their views to be accorded binding deference, they may utilize the APA procedures specifically designed to provide notice to, and allow participation by, regulated parties. In this respect *Seminole Rock* deference would be narrower than *Chevron*. See *Brand X*, 545 U.S. at 981. But *Chevron* generally applies only when an agency uses appropriately formal procedures to interpret a statute, see *Mead Corp.*, 533 U.S. at 229-230, and *Seminole Rock* deference lacks that requirement. Of course, if an agency revises its interpretation without notice-and-comment rulemaking and stands consistently by the revised interpretation over time, that interpretation would have a strong claim to deference under *Skidmore*. See 323 U.S. at 140.

b. *Agency expertise.* The Court has stated that *Seminole Rock* deference rests in part on an agency's "policymaking expertise," which "account[s] in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court." *Martin*, 499 U.S. at 153. A reviewing court therefore should not apply *Seminole Rock* deference if a particular interpretive dispute does not implicate the agency's expertise. Generally, agencies have a nuanced understanding of the regulations they administer. But when interpretive disputes happen to arise in which the agency's expertise is irrelevant, *Seminole Rock* deference should not apply. See, *e.g.*, *Gonzales* v. *Oregon*, 546 U.S. 243, 256-258 (2006)

(declining to apply *Seminole Rock* deference when an agency interprets a regulation that "merely * * * paraphrase[s] the statutory language"); *id.* at 268-269 (noting that the agency at issue lacked relevant expertise); *Jicarilla Apache Tribe* v. *FERC*, 578 F.2d 289, 292-293 (10th Cir. 1978) (similar, where the agency's interpretation of a regulatory term was based on concepts developed at common law).

c. *Agency authority.* Finally, the logic of *Seminole Rock* deference suggests that the doctrine should apply only when the *agency* has made a fair and considered interpretive judgment. A reviewing court may therefore conclude that *Seminole Rock* deference is unwarranted because a proffered interpretation was given by field officials or other low-level employees who cannot be said to speak for the agency—unlike, for example, the presidentially appointed officers who lead the agency or their delegates, its administrative boards, and other official organs of agency policy. Cf. *Mead Corp.*, 533 U.S. at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting."). Limiting *Seminole Rock* deference in that manner would promote one of the most significant benefits of the doctrine—political accountability for regulatory policy, see pp. 39-40, *infra*—by encouraging agencies to issue interpretive guidance through procedures that ensure it represents the considered views of the agency.

II. APPROPRIATELY LIMITED, *SEMINOLE ROCK* AND *AUER* SHOULD NOT BE OVERRULED

Although the United States takes seriously the concerns about *Seminole Rock* deference, those concerns do not justify overruling the doctrine if it is limited

along the lines advocated above. Notwithstanding those criticisms, *Seminole Rock*—particularly in its core applications—provides certainty and stability to regulated parties who rely on agency guidance documents. And because *Seminole Rock* has been a feature of administrative law for decades, it has generated significant private reliance interests. As a result, while the United States believes that *Seminole Rock* should be cabined, more drastic changes should be left to Congress.

A. *Stare Decisis* Counsels Against Overruling *Seminole Rock* Deference

One consideration this Court has identified in weighing whether to overrule a precedent is whether Congress "remains free to alter" the prior decision through legislation. *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 799 (2014) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). Adhering to precedent is also important "where reliance interests are involved." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). Those considerations weigh against overruling *Seminole Rock* deference.

1. Congress could alter Seminole Rock *deference*

The principal policy argument petitioner advances is that *Seminole Rock* creates an incentive for an agency to "write substantive rules * * * vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." Pet. Br. 38 (citation omitted); see Manning 655-660. Petitioner and his amici fail to identify an example of a regulation that was purposefully drafted in vague terms because of *Seminole Rock*, and there are incentives that cut the other way. Agencies have an incentive to be clear to accomplish

their purposes and to ensure compliance with a regulatory scheme. But whether *Seminole Rock* deference has had any appreciable effect on the clarity of agency regulations is, at bottom, an empirical question that Congress is well situated to analyze and address.

Petitioner also contends (Br. 48) that *Seminole Rock* deference is entitled to less weight as a precedent because it has no "statutory * * * underpinning." But whether *Seminole Rock* is consistent with the APA as an original matter, the relevant point here is that Congress remains free to alter or eliminate the doctrine. Instead of doing so, Congress has enacted legislation authorizing rulemaking against the backdrop of *Seminole Rock*—including when Congress authorized the VA to promulgate the regulation at issue here, see Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 2(a), 105 Stat. 386 (38 U.S.C. 501). Moreover, this Court has applied *Seminole Rock* and *Auer* in dozens of cases (and the lower courts in thousands of cases) over the past 50-plus years—until recently with no suggestion that the practice is inconsistent with the APA. See pp. 4-6 & nn.1-2, *supra*. It would be odd if such a longstanding and oft-invoked doctrine were entitled to little *stare decisis* weight.

Petitioner further contends (Br. 48-50) that *Seminole Rock* deference is a "procedural" rule entitled to less respect as precedent. That contention is at odds with petitioner's own views. *Stare decisis* concerns are less significant for "procedural and evidentiary rules," *Payne*, 501 U.S. at 828, because those rules "do not govern primary conduct," *Alleyne* v. *United States*, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring). But as petitioner himself contends (Br. 36-37), *Seminole Rock* deference too affects the lawfulness of primary conduct by regulated parties, since, where applicable, it

governs the meaning of regulations that regulate primary conduct. The doctrine is thus unlike the precedent this Court overruled in *Pearson* v. *Callahan*, 555 U.S. 223 (2009), which governed only the sequence in which a reviewing court was required to address two legal questions bearing on claims of qualified immunity, see *id.* at 232—not whether to grant such immunity.

2. *Overruling* Seminole Rock *deference would upset significant private reliance interests*

Considerations of *stare decisis* are "at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828. This is such a case. *Seminole Rock* and *Auer* are now part of "a long line of precedents" reaching back for decades. *Bay Mills*, 572 U.S. at 798. They have been invoked in thousands of reported decisions in the federal courts. Private parties have ordered their affairs in reasonable reliance on that settled body of law. Overruling *Seminole Rock* deference could call into question those decisions and would invite litigants "to challenge even longstanding and judicially accepted agency interpretations on the ground that the interpretation, although reasonable, is not the most persuasive" one to a particular court. Scott H. Angstreich, *Shoring up* Chevron: *A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 122 (2000).

The prospect of unsettling decisions based on *Seminole Rock* deference would loom particularly large in statutory regimes with private enforcement mechanisms. Many applications of *Seminole Rock* occur in that context, where private litigants have an incentive to stretch the boundaries of a regulation, and the agency's interpretation benefits a regulated party. See,

e.g., *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 613-614 (2011) (failure-to-warn action under state law, preempted by federal regulatory scheme); *Chase Bank USA, N. A.* v. *McCoy*, 562 U.S. 195, 201-202 (2011) (private action for damages under the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*); *Auer*, 519 U.S. at 455 (private action for unpaid overtime under the FLSA); *Long Island Care*, 551 U.S. at 164 (similar). In *PLIVA*, for example, this Court deferred to the understanding of the Food and Drug Administration (FDA) that its regulations require the manufacturer of a generic drug to label the drug with the same information approved by the agency for the equivalent brand-name drug, see 564 U.S. at 613-614—thus foreclosing a plaintiff's failure-to-warn suit based on alleged deficiencies in the generic drug's label. Private parties have no doubt made investment (property) and pricing (contract) decisions in reasonable reliance on that understanding of the regulatory scheme, which exempts generic manufacturers from certain tort liability to which brand-name manufacturers are subject. Overruling the doctrine would threaten to upend those and similar reliance interests.

Narrowing *Seminole Rock* deference, however, would be far less likely to upset settled reliance interests. It would retain the doctrine in its core applications—for example, when the agency announces its interpretation in advance in a widely available guidance document, as it did in *Seminole Rock* itself. The Court, moreover, has acknowledged in recent years that the doctrine "does not apply in all cases" and "is undoubtedly inappropriate" in some circumstances. *Christopher*, 567 U.S. at 155. Consequently, narrowing *Seminole Rock* deference would not present the same degree of reliance concerns as overruling it altogether, and would be con-

sistent with the path this Court has charted in other areas where it has narrowed but not overruled a precedent in light of experience. See, *e.g.*, *Arizona* v. *Gant*, 556 U.S. 332, 343 (2009) (vehicle searches incident to the arrest of an occupant).

3. Overruling Seminole Rock *deference would impose practical costs on courts and regulated parties*

Notwithstanding the criticisms of *Seminole Rock*, even its critics acknowledge that there are significant practical benefits to the rule. See, *e.g.*, Manning 616-617, 629-630. Specifically, *Seminole Rock* deference promotes political accountability, national uniformity, and predictability. It also respects the expertise that agencies can bring to bear in interpreting the complex regulatory schemes they administer. These practical benefits would be lost or diminished by overruling the doctrine. Cf. *Citizens United* v. *FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (observing that whether to overrule a precedent requires a "sober appraisal" of the "practical effects" of doing so) (citation omitted).

a. *Seminole Rock* deference promotes political accountability for regulatory policy by allocating certain policy-laden interpretive decisions to agencies, rather than judges. As this Court has recognized, the resolution of an ambiguity in an agency regulation "entail[s] the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ.*, 512 U.S. at 512 (citation omitted). Indeed, petitioner criticizes (Br. 3) *Seminole Rock* deference precisely because it permits agencies to "make a *policy* judgment" in choosing among reasonable readings of ambiguous regulations. Those judgments, properly constrained by the regulatory text and fair-notice requirements, are better left to officials in

the Executive Branch who are subject to the supervision of the President, who in turn is accountable to the Nation for the execution of the laws. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). A similar "sensitivity to the proper roles of the political and judicial branches" has long informed this Court's view of *Chevron* deference. *Pauley*, 501 U.S. at 696; see *Chevron*, 467 U.S. at 866 (concluding that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do").

Petitioner suggests (Br. 3) that overruling *Seminole Rock* would have the desirable effect of replacing these agency policy judgments with a judicial determination "about the best *legal* interpretation" of a regulation. But *Seminole Rock* deference, when properly circumscribed, applies only when a reviewing court has *already* employed the traditional tools of legal interpretation and there are multiple reasonable readings. In those circumstances, reasonable minds can disagree about the "best interpretation." Pet. Br. 22, 37. *Seminole Rock* deference also applies when an agency interprets a regulation that is phrased at a high level of generality, such as requiring particular conduct when "reasonable," "to the extent necessary," or "consistent with best practices." Specifying how to apply such an administrative standard to particular conduct is a task that is more appropriately performed by "administrators, not * * * judges." *Chevron*, 467 U.S. at 864.

b. *Seminole Rock* deference promotes national uniformity. Under *Seminole Rock*, a regulation that is susceptible of more than one reasonable reading will generally be given the same interpretation—the agency's—by courts throughout the country. See *Christopher*, 567 U.S. at 158 n.17 (explaining that deference reduces

"conflict in the [c]ircuit[]" courts) (citation omitted); *Ford Motor Credit Co.*, 444 U.S. at 568 (deferring to an agency interpretation in light of Congress's "decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation"); *APA Final Report* 14 ("The 94 Federal district and territorial courts are structurally incapable of the same uniformity in the application of law as a single centralized agency."). Overruling the doctrine would undermine that uniformity and invite a patchwork of conflicting interpretations in different courts.

Petitioner's suggestion (Pet. 3) that *Seminole Rock* deference is significant only in cases in which a particular reviewing court would otherwise reach a different judgment about the "best" interpretation is thus incomplete. Agencies must implement standards on a nationwide basis, and this Court can review only a small fraction of the decisions reviewing agency interpretations. Absent *Seminole Rock* deference, courts' disagreements over the best or fairest interpretation of an ambiguous text could significantly undercut the uniformity of federal law. Cf. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) ("It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way."). And an agency's ability to engage in additional rulemaking in response to conflicting judicial interpretations does not fully ameliorate this concern. For a variety of reasons, notice-and-comment rulemaking "often requires many years and tens of thousands of person hours to complete." Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*,

52 Admin. L. Rev. 547, 550-551 (2000). Rulemaking cannot practicably be used as a routine way of correcting errant district-court decisions.

c. *Seminole Rock* deference recognizes the scientific and technical expertise of agencies and the experience they develop in administering a complex regulatory scheme. See, *e.g.*, *Gonzales*, 546 U.S. at 256 (noting that an agency's interpretation often reflects "considerable experience and expertise * * * acquired over time"); *Thomas Jefferson Univ.*, 512 U.S. at 512 (explaining that "broad deference is all the more warranted when * * * the regulation concerns 'a complex and highly technical regulatory program'") (quoting *Pauley*, 501 U.S. at 697). Agencies employ specialized staff and can engage in the type of broad factual inquiry that may be necessary to a well-informed resolution of a policy dispute. The choice between competing interpretations of ambiguous language often "turn[s] upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency * * * possesses," but a court does not. *Long Island Care*, 551 U.S. at 167-168.

Petitioner asserts (Br. 42-43) that agency expertise is irrelevant to the questions currently governed by *Seminole Rock* deference. That is incorrect. FDA, for example, routinely receives *Seminole Rock* deference for its interpretation of regulations implicating the agency's scientific knowledge. See, *e.g.*, *Actavis Elizabeth LLC* v. *United States FDA*, 625 F.3d 760, 763 (D.C. Cir. 2010) (deferring to the agency's understanding of whether a particular compound should be treated as a single new "active moiety," where it consists of a previously approved moiety joined by a non-ester covalent bond to a lysine group) (quoting 21 C.F.R. 314.108(a)).

The Nuclear Regulatory Commission likewise commonly receives deference. See, *e.g.*, *McMunn* v. *Babcock & Wilcox Power Generation Grp., Inc.*, 869 F.3d 246, 260-262 (3d Cir. 2017) (deferring to the agency's interpretation of the term "'restricted area'" in a regulation governing radioactive emissions from "a restricted area") (citation omitted), cert. denied, 138 S. Ct. 1012 (2018). Those and similar disputes plainly implicate an agency's scientific and technical expertise, which a generalist court cannot match.

d. Finally, *Seminole Rock* deference, when appropriately limited, can make agency guidance more reliable for regulated parties and thus foster regulatory certainty and predictability. As this Court has explained, the purpose of an interpretive rule is to set forth "the agency's construction of the statutes and rules which it administers." *Guernsey Mem'l Hosp.*, 514 U.S. at 99 (quoting, indirectly, *APA Manual* 30 n.3). Regulated parties may then rely on the agency's guidance about its regulations, rather than having to conduct their own de novo analysis of those regulations and then predict whether or not a court will agree. *Seminole Rock* thus can provide regulated parties with a measure of certainty that the agency's interpretation will not be lightly set aside later by a reviewing court. Indeed, in some statutes, Congress has mandated that regulated parties cannot be held liable for complying in good faith with agency guidance. See, *e.g.*, *Mortgage Bankers*, 135 S. Ct. at 1209 (discussing safe-harbor provision in the FLSA); *Ford Motor Credit Co.*, 444 U.S. at 566-567 (discussing safe-harbor provision in the Truth in Lending Act, 15 U.S.C. 1640(f)). *Seminole Rock* deference serves a similar function.

Petitioner argues (Br. 37) that a regulated party actually has less certainty because it can only read the

regulation and "make a judgment about [its] best interpretation," without any confidence that the "best" interpretation will prevail in judicial review. But that provides an incomplete picture, because a regulated party that wishes to conform its conduct to a regulation also can read the agency's guidance, and make a judgment about whether the agency's interpretation is a consistent, reasonable resolution of genuine ambiguity in the regulation. The *Seminole Rock* regime therefore can provide more stability and predictability than one in which the meaning of a regulation must be determined de novo in every judicial proceeding.

B. Petitioner Fails To Offer Sufficient Special Justifications For Overruling, Rather Than Narrowing, The Decisions

This Court requires a "'special justification'" to overrule one of its precedents, "not just an argument that the precedent was wrongly decided." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (citation omitted). For the reasons already explained, the United States agrees that *Seminole Rock* deference should be narrowed in important respects. But those concerns do not justify overruling the doctrine at this late date, more than seventy years after the APA's enactment and after this Court has repeatedly applied and reaffirmed the doctrine.

The "special justifications" petitioner identifies (Br. 47-48) simply restate his argument that *Seminole Rock* and *Auer* were wrongly decided. He does not argue that the doctrine has proven to be "unworkable or confusing." *Patterson*, 491 U.S. at 173. He invokes changed circumstances since 1945, but fails to explain which aspects of modern administrative government he finds "far broader" (Pet. Br. 54) than the regulations at issue

in *Seminole Rock*, which this Court described as bringing "the entire economy of the nation under price control" during a war, *Seminole Rock*, 325 U.S. at 413. And the fact that *Seminole Rock* predated the APA (Pet. Br. 53) is not a compelling reason to overrule it now.

Finally, petitioner briefly contends (Br. 45) that *Seminole Rock* deference is inconsistent with "separation-of-powers principles" because its "practical effect is to vest in a single branch the law-making and law-interpreting functions." But *Seminole Rock* deference does not result in an admixture of "legislative" and "judicial" functions in the constitutional sense. As Justice Scalia explained for the Court, "[a]gencies make rules * * * and conduct adjudications * * * and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington*, 569 U.S. at 304-305 n.4 (quoting U.S. Const. Art. II, § 1, Cl. 1); see *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986); *INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983). Petitioner's reliance on *Chadha* (Br. 45) is thus misplaced. Executive agencies do not exercise "legislative Powers," U.S. Const. Art. I, § 1, when they exercise statutory rulemaking authority. And of course it does not violate the separation of powers for an executive agency to exercise different types of executive power.

Petitioner's separation-of-powers argument also cannot easily be cabined to *Seminole Rock*. Congress has authorized numerous agencies to both make rules and interpret those rules in adjudication. Indeed, "[u]nder most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority." *Martin*, 499 U.S. at 151 (citing, as examples, the Federal Trade Commission, 15 U.S.C.

41 *et seq.*; the Securities and Exchange Commission, 15 U.S.C. 77s-77u; and the Federal Communications Commission, 47 U.S.C. 151 *et seq.*). And this Court has rejected constitutional challenges to those arrangements. See *FTC* v. *Cement Inst.*, 333 U.S. 683, 702 (1948); cf. *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955). Moreover, accepting the proposition that the separation of powers forbids Congress from authorizing a single governmental entity to be the interpreter of its own rules arguably would extend well beyond *Seminole Rock*. It is not clear, for instance, that federal courts could authoritatively construe ambiguities in the judicial rules they promulgate under that view.

In seeking this Court's review, petitioner contended that *Seminole Rock* deference "represents a transfer of judicial power to the Executive Branch." Pet. 16 (citation omitted). Petitioner has abandoned that argument, and the Court should not address it. In any event, courts routinely defer when a constitutional or statutory provision vests discretion in another Branch. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."); *e.g.*, *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2574 (2014); *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009). If this Court retains *Seminole Rock* deference, then it is concluding, at least as a matter of *stare decisis*, that Congress intended to vest discretion in agencies to resolve ambiguities in their regulations. And on that premise, when a court applies *Seminole Rock*, it is exercising its "judicial Power" rather than transferring it. U.S. Const. Art. III, § 1; see 5 U.S.C. 706.

III. THE JUDGMENT SHOULD BE AFFIRMED

The court of appeals applied *Seminole Rock* deference in this case without observing the limitations that should properly govern the doctrine. Indeed, this case illustrates how courts have turned to *Seminole Rock* unnecessarily, without applying the traditional tools of construction. But the judgment should nonetheless be affirmed because the interpretation the Board applied and the Federal Circuit endorsed is the only reasonable interpretation. At the least, it is the *most* reasonable one.

A. As explained above (see pp. 8-9, *supra*), the VA's regulations distinguish between *reopening* a prior claim for benefits on the basis of "new and material evidence" and *reconsidering* a claim on the basis of "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. 3.156(a) and (c)(1). When a claim is *reopened* and then granted, the veteran is generally entitled to benefits from the time the VA received the claim to reopen or the date entitlement arose, whichever is later. 38 C.F.R. 3.400(q)(2). By contrast, when a claim is *reconsidered* and then granted, the veteran is generally entitled to benefits from the time the VA received the previously decided claim or the date entitlement arose, whichever is later. 38 C.F.R. 3.156(c)(3).

In practice, Section 3.156(c) mandates an earlier effective date for a benefits award when "the veteran's claim was originally denied due to error or inattention on the part of the government," as where the VA fails to consider pertinent service department records that existed at the time of the original denial. *Sears* v. *Principi*, 349 F.3d 1326, 1331 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004). Section 3.156(c) thus serves to "ensure[] that a veteran is not denied benefits due to an

administrative error," by placing the veteran in "the position" in which "he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh* v. *McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014).

Here, the VA correctly determined that the additional service department records at issue in 2006 were not "relevant," 38 C.F.R. 3.156(c)(1), to the agency's 1983 denial of petitioner's claim for benefits for PTSD. Pet. App. 42a-43a. In the original 1983 decision, it was undisputed that petitioner participated in Operation Harvest Moon during the Vietnam War. His claim was denied, however, because notwithstanding such participation, "there was no diagnosis of PTSD" at the time, and such a diagnosis was a prerequisite to an award of benefits. *Id.* at 42a. The additional service department records at issue in 2006 do not show that he had such a diagnosis as of 1983. Instead, they simply further confirm what no one disputed—that petitioner had participated in Operation Harvest Moon. See pp. 8-10, *supra*. The psychiatrist who examined him in 1983 already had documented that fact, even while concluding that petitioner did not suffer from PTSD. See J.A. 11-13. The additional service records thus were entirely irrelevant to the dispositive defect in petitioner's 1983 claim—the lack of a diagnosis of PTSD. Indeed, it is undisputed that the VA would have denied the benefits for the same reason in 1983 even if it had considered the additional records.

B. The court of appeals affirmed after finding the term "relevant" in 38 C.F.R. 3.156(c)(1) ambiguous and deferring to the VA's interpretation. Pet. App. 14a-19a. The court reached the correct result, but it was unnecessary to apply *Seminole Rock* deference. Section 3.156(c)(1) is not ambiguous.

The text of the regulation favors the VA's interpretation. The ordinary meaning of "relevant" is "[h]aving a bearing on or connection with the matter at hand." *American Heritage Dictionary of the English Language* 1483 (5th ed. 2016); see 13 *Oxford English Dictionary* 561 (2d ed. 1989). In legal usage, the term likewise ordinarily means "tending to prove or disprove a matter in issue." *Black's Law Dictionary* 1481 (10th ed. 2014); cf. Fed. R. Evid. 401. In Section 3.156(c)(1), the "matter at hand" to which the additional records must be relevant is whether to reconsider the VA's prior decision denying the veteran's claim. That is the most natural reading of the first sentence of the regulation, which contemplates that the VA will "reconsider the claim" only if the VA "receives or associates with the claims file relevant" additional records. 38 C.F.R. 3.156(c)(1).

The context and logic of the regulation also compel that reading. As explained above, the hallmark of reconsidering (as distinct from reopening) a prior claim is that the VA concludes that its prior decision on the claim was incorrect *ab initio*—*i.e.*, that the VA would have reached a different result at the time of its prior decision had it considered the additional records. Cf. 38 C.F.R. 3.156(c)(2) (providing that the VA will not reconsider a claim on the basis of "records that VA could not have obtained when it decided the claim"). Therefore, to be "relevant" for purposes of reconsideration, the additional records must speak to the basis for the VA's prior decision.

That reading is confirmed by an adjacent provision. Section 3.156(c)(3) states that an "[a]n award" in a case the VA reconsiders is retroactive only if the award is "made *based all or in part on* the records identified by paragraph (c)(1)." 38 C.F.R. 3.156(c)(3) (emphasis

added). Paragraph (c)(1) is the provision requiring "relevant" additional records for reconsideration. 38 C.F.R. 3.156(c)(1). Read together, the two paragraphs demonstrate that Section 3.156(c) "only applies 'when VA receives official service department records that were unavailable at the time that VA previously decided a claim for benefits and *those records lead VA to award a benefit that was not granted in the previous decision.*'" *Blubaugh*, 773 F.3d at 1314 (citation omitted). When service department records are duplicative of evidence already submitted as part of the initial claim, any award of benefits generally would not be "based all or in part on" those service department records.

The two additional service records at issue here are not relevant to the VA's prior decision denying benefits, because in that decision, all acknowledged that petitioner participated in Operation Harvest Moon, which was the only issue that the records addressed. The VA's denial, in contrast, was based on the entirely separate issue of whether petitioner had been diagnosed with PTSD, which the records do not address. As the Board explained, the records "skip[ped] this antecedent" issue and instead "address[ed] the next * * * requirement" for his claim, "a traumatic event during service." Pet. App. 42a.

C. Petitioner contends (Br. 55-61) that the "best interpretation" of Section 3.156(c) is that additional service records are "'relevant'" as long as they "support any element of a veteran's claim for benefits." But that reading makes no sense in context. On petitioner's view, the VA would be required to reconsider its prior decision on a claim whenever a claimant submits records that support any element of that claim, even if the additional records are in fact *irrelevant* to the VA's ultimate conclusion in its prior decision. Here, for example, the prerequisite

to disability benefits that petitioner's additional records addressed—whether petitioner had experienced an in-service stressor during his service in Operation Harvest Moon (see Pet. Br. 58 n.16)—was undisputed and, in light of the absence of a PTSD diagnosis, did not affect the agency's decision. See Pet. App. 42a-43a; see also *id.* at 18a (whether petitioner "was exposed to an in-service stressor * * * was never at issue in this case"). The VA thus determined that the records did not address any fact that "is *of consequence* in determining the action." Pet. Br. 57 (quoting Fed. R. Evid. 401(b)) (emphasis added).

Petitioner also contends (Br. 58) that the VA's interpretation collapses any distinction between "relevant" records under Section 3.156(c)(1) and "material" evidence under Section 3.156(a). That is incorrect. For purposes of reopening a claim, the regulation defines "material" evidence as "existing evidence that * * * relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. 3.156(a). Unlike the "relevant official service department records" required to warrant reconsideration, 38 C.F.R. 3.156(c)(1), "material" evidence under Section 3.156(a) need not suggest that the VA's prior decision on the claim was incorrect at the time. Section 3.156(a) is thus broader than Section 3.156(c)(1) in two ways: the claimant can submit any kind of evidence (not merely service records), and he can submit evidence that may warrant a different decision now without questioning any previous decision. The VA reasonably chose two different adjectives.

But even assuming the VA's interpretation gives the terms the same meaning, that is hardly strange. When describing evidence, the terms "material" and "relevant" are not substantially different. See *Black's Law Dictionary* 1124, 1481 (cross-referencing the definition

of "material" in the definition of "relevant," and vice versa). Petitioner invokes (Br. 58) the canon that different terms should carry different meanings, but the different meaning that petitioner strains to attribute to "relevant"—*i.e.*, records supportive of "any element of a veteran's claim" (Br. 56)—is not plausible here. That interpretation would make it easier for a veteran to establish a basis for reconsideration than reopening—even though reconsideration can be more favorable than reopening because it can lead to the award of retroactive benefits. Put differently, even if the service department records at issue here had been considered in 1983, petitioner still would have been denied benefits at that time based on the lack of any diagnosis of PTSD. Petitioner thus seeks to be placed in a *better* position than he would have occupied if those service department records had been considered by the VA from the outset. That result does not make any sense, and the court of appeals should have rejected it without needing to resort to *Seminole Rock* deference.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
MATTHEW GUARNIERI
Assistant to the Solicitor General
MARK B. STERN
DANIEL AGUILAR
JOSHUA REVESZ
Attorneys

FEBRUARY 2019

APPENDIX

1. 5 U.S.C. 551 provides in pertinent part:

Definitions

For the purpose of this subchapter—

* * * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * * * *

2. 5 U.S.C. 553 provides:

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required

by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

3. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

4. 38 U.S.C. 7292 provides in pertinent part:

Review by United States Court of Appeals for the Federal Circuit

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabili-

ties adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

* * * * *

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual de-

termination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.

5. 38 C.F.R. 3.156 (2018) provides:

New and material evidence.

(a) *General.* A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

(Authority: 38 U.S.C. 501, 5103A(f), 5108)

(b) *Pending claim.* New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of § 20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

(Authority: 38 U.S.C. 501)

(c) *Service department records.* (1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

(ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(2) Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

(Authority: 38 U.S.C. 501(a))

6. 38 C.F.R. 3.304(f) provides:

Direct service connection; wartime and peacetime.

(f) *Posttraumatic stress disorder.* Service connection for posttraumatic stress disorder requires medical evidence diagnosing the condition in accordance with § 4.125(a) of this chapter; a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. The following provisions apply to claims for service connection of posttraumatic stress disorder diagnosed during service or based on the specified type of claimed stressor:

(1) If the evidence establishes a diagnosis of posttraumatic stress disorder during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(2) If the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(3) If a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist

or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor. For purposes of this paragraph, "fear of hostile military or terrorist activity" means that a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as from an actual or potential improvised explosive device; vehicle-imbedded explosive device; incoming artillery, rocket, or mortar fire; grenade; small arms fire, including suspected sniper fire; or attack upon friendly military aircraft, and the veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

(4) If the evidence establishes that the veteran was a prisoner-of-war under the provisions of § 3.1(y) of this part and the claimed stressor is related to that prisoner-of-war experience, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(5) If a posttraumatic stress disorder claim is based on in-service personal assault, evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident. Examples of such evidence include, but are not limited to: records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians; pregnancy tests or tests for sexually transmitted diseases; and statements from family members, roommates, fellow service members, or clergy. Evidence of behavior changes following the claimed assault is one type of relevant evidence that may be found in these sources. Examples of behavior changes that may constitute credible evidence of the stressor include, but are not limited to: a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes. VA will not deny a posttraumatic stress disorder claim that is based on in-service personal assault without first advising the claimant that evidence from sources other than the veteran's service records or evidence of behavior changes may constitute credible supporting evidence of the stressor and allowing him or her the opportunity to furnish this type of evidence or advise VA of potential sources of such evidence. VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred.

7. 38 C.F.R. 3.400 provides in pertinent part:

General

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later.

(Authority: 38 U.S.C. 5110(a))

* * * * *

(q) ***New and material evidence (§ 3.156) other than service department records*—(1) *Received within appeal period or prior to appellate decision.*** **The effective date will be as though the former decision had not been rendered. See §§ 20.1103, 20.1104 and 20.1304(b)(1) of this chapter.**

(2) ***Received after final disallowance.*** **Date of receipt of new claim or date entitlement arose, whichever is later.**

* * * * *

8. 38 C.F.R. 4.126 (1983) provides:

Substantiation of diagnosis.

It must be established first that a true mental disorder exists. The disorder will be diagnosed in accordance with the APA manual. A diagnosis not in accord with this manual is not acceptable for rating purposes

and will be returned through channels to the examiner. Normal reactions of discouragement, anxiety, depression, and self-concern in the presence of physical disability, dissatisfaction with work environment, difficulties in securing employment, etc., must not be accepted by the rating board as indicative of psychoneurosis. Moreover, mere failure of social or industrial adjustment or the presence of numerous complaints should not, in the absence of definite symptomatology typical of a psychoneurotic or psychophysiologic disorder, become the acceptable basis of a diagnosis in this field. It is the responsibility of rating boards to accept or reject diagnoses shown on reports of examination. If a diagnosis is not supported by the findings shown on the examination report, it is incumbent upon the board to return the report for clarification.

9. 38 C.F.R. 4.127 (1983) provides:

Mental deficiency and personality disorders.

Mental deficiency and personality disorders will not be considered as disabilities under the terms of the schedule. Attention is directed to the outline of personality disorders in the APA manual. Formal psychometric tests are essential in the diagnosis of mental deficiency. Brief emotional outbursts or periods of confusion are not unusual in mental deficiency or personality disorders and are not acceptable as the basis for a diagnosis of psychotic reaction. However, properly diagnosed superimposed psychotic reactions developing after

enlistment, i.e., mental deficiency with psychotic reaction or personality disorder with psychotic reaction, are to be considered as disabilities analogous to, and ratable as, schizophrenic reaction, unless otherwise diagnosed.

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW J. PINCUS
CHARLES A. ROTHFELD
E. BRANTLEY WEBB
ANDREW A. LYONS-BERG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities ii
Reply Brief for Petitioner 1
I. No deference is warranted to the VA's construction. 1
A. *Auer* is incompatible with the APA. 1
B. *Skidmore* is most consistent with the APA. 8
II. *Stare decisis* does not justify retention of *Auer* deference. 12
III. Petitioner offers the best reading of Section 3.156(c). 17
Conclusion 25

TABLE OF AUTHORITIES

Page(s)

Cases

Accardi v. *Shaughnessy*,
347 U.S. 260 (1954) 7

Alaska Dep't of Envtl. Conservation v. *EPA*,
540 U.S. 461 (2004) 11

Christopher v. *SmithKline Beecham Corp.*,
567 U.S. 142 (2012) 10

City of Arlington v. *FCC*,
569 U.S. 290 (2013) 1, 2, 5

Decker v. *Northwest Envtl. Def. Ctr.*,
568 U.S. 597 (2013) 13

Exxon Shipping Co. v. *Baker*,
554 U.S. 471 (2008) 13

Federal Express Corp. v. *Holowecki*,
552 U.S. 389 (2008) 11, 12

Gonzales v. *Oregon*,
546 U.S. 243 (2006) 11

Henry Schein, Inc. v. *Archer & White Sales, Inc.*,
139 S. Ct. 524 (2019) 10

League of United Latin Am. Citizens v. *Perry*,
548 U.S. 399 (2006) 19

Lennox v. *Principi*,
353 F.3d 941 (Fed. Cir. 2003) 5

Long Island Care v. *Coke*,
551 U.S. 158 (2007) 16

Martin v. *Occupational Safety & Health Review Comm'n*,
499 U.S. 144 (1991) 4

Cases—continued

Martinez v. *Holder*,
740 F.3d 902 (4th Cir. 2014) 7

Morton v. *Ruiz*,
415 U.S. 199 (1974) 5

Nielson v. *Shinseki*,
607 F.3d 802 (Fed. Cir. 2010) 6

NLRB v. *Bell Aerospace Co.*,
416 U.S. 267 (1974) 6

NLRB v. *Curtin Matheson Sci., Inc.*,
494 U.S. 775 (1990) 6

Old Chief v. *United States*,
519 U.S. 172 (1997) 19

Pearson v. *Callahan*,
555 U.S. 223 (2009) 13

Perez v. *Mortgage Bankers Ass'n*,
135 S. Ct. 1199 (2015) 2, 3, 7, 9

SEC v. *Chenery Corp.*,
332 U.S. 194 (1947) 6

Skidmore v. *Swift & Co.*,
323 U.S. 134 (1944) 11

United States v. *Mead Corp.*,
533 U.S. 218 (2001) ..... *passim*

University of Tex. Sw. Med. Ctr. v. *Nassar*,
570 U.S. 338 (2013) 11

Statutes, Rules, and Regulations

5 U.S.C.
§ 551(4) 2, 5
§ 551(5) 2, 5, 7
§ 551(6) 2, 5

Statutes, Rules, and Regulations—continued

5 U.S.C.
§ 551(7) 2
§ 553 2
§ 706 4
29 U.S.C. § 160 6
38 U.S.C.
§ 101(35) 19
§ 501(a) 5
§ 5103A(c) 22
§ 5107(a) 23
§ 20.1303 7
49 Stat. 803 6
38 C.F.R. § 3.156(a) 19, 20, 21, 22
38 C.F.R. § 3.156(c) ..... *passim*
38 C.F.R. § 3.156(c)(1) 18, 20
38 C.F.R. § 3.156(c)(1)(i) 22
Fed. R. Evid. 401 ..... 19, 21
Fed. R. Evid. 403 19

Other Authorities

71 Fed. Reg. 52,455 ..... 5, 18
Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* (8th ed. 2017) 2, 7
U.S. Dep't of Veterans Affairs, *VA Achieves Historic Goal by Delivering 81,000 Appeals Decisions* (Sept. 18, 2018) 6
Webster's Third New International Dictionary (1961) 20, 21

REPLY BRIEF FOR PETITIONER

Criticism of *Auer* deference now comes from all corners. Leading immigration organizations highlight its harmful effects. NIJC & AILA Br. 21-31. The AFL-CIO agrees that "the Court should * * * discard the strong form of deference represented by *Auer*" (AFL-CIO Br. 16) and, moreover, that deference is not appropriate in this case (*id.* at 20-24). See also Nat'l Right to Work Legal Def. Found. Br. 2. Several States call for overruling *Auer*—and none defend it.

Even the United States agrees. Acknowledging that *Auer* "raises significant concerns" (U.S. Br. 12), the government now concurs with our principal argument: no deference to the agency is warranted here.

Auer deference circumvents the procedural protections that Congress established in the APA, and it transfers to agencies substantial lawmaking authority absent any congressional delegation. The Court should therefore overturn *Seminole Rock* and *Auer*.

The government instead asks the Court to adopt a diminished form of *Auer* deference—one that looks like *Skidmore* but carries *Auer*'s binding bite. Petitioner would prevail under this rule. That said, the better course is to overrule *Auer* outright. What would remain, *Skidmore*, properly respects agency expertise.

I. No deference is warranted to the VA's construction.

A. *Auer* is incompatible with the APA.

1. Binding deference (either *Chevron* or *Auer*) confers on an agency lawmaking authority, as its actions have the force of law. See Pet'r Br. 25. In *City of Ar-*

lington v. *FCC*, 569 U.S. 290 (2013), the Court unanimously agreed that two conditions are necessary for an agency to exercise this power: (1) "the agency must have received congressional authority to determine the particular matter at issue" *and* (2) the agency must act in the "particular manner" Congress specified. *Id.* at 306. See also *id.* at 321-322 (Roberts, C.J., dissenting).

The APA specifies generally-applicable "manners" by which an agency may act. An agency may promulgate a "rule," which is defined as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). A "rule" is the result of a "rule making" process. *Id.* § 551(5). See *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). The APA establishes both informal notice-and-comment rulemaking (5 U.S.C. § 553) and formal on-the-record rulemaking (*id.* §§ 556-557). See Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 466 (8th ed. 2017).[1]

In two complementary lines of cases, the Court has held that an agency's entitlement to binding deference turns on whether it has used congressionally-prescribed procedures. *Auer*'s fundamental flaw is

---

[1] Agencies may also act through formal and informal adjudications. See Breyer, *supra*, at 457. Agency adjudications result in an "order" (5 U.S.C. § 551(7)), which excludes matter that is properly the subject of a "rule making" (*id.* § 551(6)). "Strikingly, the APA imposes no procedural requirements specific to informal adjudications." Breyer, *supra*, at 474.

that it provides agencies lawmaking authority in contravention of these settled principles. The government now agrees. U.S. Br. 19-25.

Focusing on the APA's protections in Section 553, *Perez* recognized that "interpretive rules" are an exception to the general notice-and-comment requirement. "The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules." *Perez*, 135 S. Ct. at 1204. "But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Ibid.*

An agency's construction of its own ambiguous regulation is an interpretive rule, and *Perez* holds that such rules do not command binding deference. See Pet'r Br. 31-33; U.S. Chamber Br. 16-19; Prof. Merrill Br. 7-9, 14-16. *Auer* thus circumvents the APA's critical procedural protections. See Pet'r Br. 28-31. According to the government, it is "anomalous that interpretive rules about a *statute's* meaning are generally accorded no *Chevron* deference," while "interpretive rules about a *regulation's* meaning are accorded *Seminole Rock* deference." U.S. Br. 24-25.

And in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), the Court emphasized that binding deference is limited to those agency actions that were "promulgated in the exercise" of the "authority" that Congress delegated. *Id.* at 226-227. *Mead* held that, where there is no "congressional intent" delegating lawmaking authority to a specific kind of agency procedure, *Chevron* does not apply. *Id.* at 227.

Auer deference, however, applies regardless whether there is any "congressional intent" delegating lawmaking authority to an agency. See Pet'r Br. 33-36. The doctrine therefore bestows power on agencies in violation of *Mead*. See U.S. Br. 19-22.

This all accords with the text of the APA. Section 706 provides that "the reviewing court"—and not the agency—"shall decide all relevant questions of law" and shall "determine the meaning * * * of the terms of an agency action." 5 U.S.C. § 706. See also Pet'r Br. 27; Prof. Merrill Br. 14-16. There is no basis to conclude that Congress silently intended for agencies, not courts, to decide these issues. See U.S. Br. 16-18.

2. The lone defender of *Auer* deference—a group of six professors—offers two main legal contentions.

a. *Amici* (Admin. Law Scholars Br. 6-8) identify *Martin* v. *Occupational Safety & Health Review Commission*, 499 U.S. 144, 151 (1991), which "presume[d] that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." See also *id.* at 152 (similar). But this addresses only *City of Arlington*'s first requirement. The agency must also act in the "particular manner" that Congress prescribed. *Auer* violates this principle.

b. *Amici* alternatively suggest that one "manner" for an agency to act with the force of law is via an informal adjudication. They imply that deference is warranted here because the construction of the regulation stemmed from a single ALJ's non-precedential opinion, rather than from a considered decision by VA leadership with general application. See Admin. Law

Scholars Br. 21-24 & 28 n.11. That is incorrect. See U.S. Br. 25 n.5.

First, Congress has never authorized the VA to engage in lawmaking through informal adjudication. The APA expressly disclaims adjudication as a procedure for an agency "to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4)-(7). See also *Morton* v. *Ruiz*, 415 U.S. 199, 232 (1974) ("No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an ad hoc basis.").

Beyond the APA's default rules, Congress specified the "particular manner" in which the VA may act. *City of Arlington*, 569 U.S. at 306. It may "prescribe all rules and regulations"—but not orders—"which are necessary or appropriate to carry out the laws administered by the Department." 38 U.S.C. § 501(a). Most relevant here, the VA may promulgate "*regulations* with respect to the nature and extent of proof and evidence" necessary "to establish the right to [veterans'] benefits." *Id.* § 501(a)(1) (emphasis added). The regulation at issue, 38 C.F.R. § 3.156(c), was promulgated expressly pursuant to Section 501(a). See 71 Fed. Reg. 52,455.

VA informal adjudications do not, accordingly, qualify for any deference, including *Chevron*. See, *e.g.*, *Lennox* v. *Principi*, 353 F.3d 941, 945 (Fed. Cir. 2003) ("The [Board of Veterans' Appeals'] explicit interpretation of these statutes and regulations * * * is a legal

ruling to be reviewed without deference."); *Nielson* v. *Shinseki*, 607 F.3d 802, 805 (Fed. Cir. 2010).[2]

Second, the Board's decisions cannot warrant binding deference, including *Chevron*, because they are non-precedential.

In *Mead*, 533 U.S. at 232, the Court denied *Chevron* deference to an agency action that would not "naturally bind more than the parties to the ruling." The Court underscored that, when an "agency makes it clear that [an action's] binding character as a ruling stops short of third parties," and thus is "conclusive only as between" the parties directly affected, the agency cannot be understood to have "ever set out with a lawmaking pretense in mind." *Id.* at 233.

Mead observed that "[a]ny suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year * * * is simply self-refuting." 533 U.S. at 233. So too here, where the Board of Veterans' Appeals issued 81,000 decisions in fiscal year 2018. See U.S. Dep't of Veterans Affairs, *VA Achieves Historic Goal by Delivering 81,000 Appeals Decisions* (Sept. 18, 2018), perma.cc/5AW5-3CLB. By

---

[2] Congress may provide specific agencies different authority. The governing statute in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), authorized "such rules and regulations and *such orders* as" the SEC "may deem necessary or appropriate." 49 Stat. 803, 833 (emphasis added). The SEC's flexibility "to act either by general rule or by individual order" (332 U.S. at 202) stemmed from Congress's express delegation of that power. Likewise, the National Labor Relations Act (see 29 U.S.C. § 160) at issue in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), authorized the NLRB to act through adjudications. See *NLRB* v. *Curtin Matheson Sci., Inc.*, 494 U.S. 775, 803 (1990) (Scalia, J., dissenting).

regulation, all 81,000 of these decisions are "[n]on-precedential." 38 C.F.R. § 20.1303. Such mass-produced, non-precedential agency actions do not reflect the "deliberation that should underlie a pronouncement" that has "the effect of law." *Mead*, 533 U.S. at 230. See also *Martinez* v. *Holder*, 740 F.3d 902, 910 (4th Cir. 2014).

Third, to "amend[]" a regulation, the APA obligates agencies to engage in "rule making." 5 U.S.C. § 551(5). The APA thus "mandate[s] that agencies use the same procedures when they amend * * * a rule as they used to issue the rule in the first instance." *Perez*, 135 S. Ct. at 1206. Once an agency proceeds through notice-and-comment rulemaking, it must return to rulemaking for its actions to have the force of law. See Pet'r Br. 36; *Accardi* v. *Shaughnessy*, 347 U.S. 260, 265-267 (1954); Breyer, *supra*, at 485.

* * *

Auer deference is irreconcilable with the Court's justifications (in *Perez*, *City of Arlington*, *Mead*, and elsewhere) for affording agencies binding deference.[3] And *Auer* impermissibly bestows on agencies lawmaking authority unbounded by the procedural limitations that Congress imposed in the APA to protect the regulated public. For these reasons, the Court should overrule *Seminole Rock* and *Auer*.

---

[3] *Amici* (Admin. Law Scholars Br. 27) are wrong to suggest that overturning *Auer* undermines *Chevron*. *Perez*, *City of Arlington*, and *Mead* are all consistent with *Chevron*. See, *e.g.*, Pet'r Br. 45-47; Cato Br. 8-13; Prof. Merrill Br. 12-14; Admin. Law & Fed. Reg. Profs. Br. 3-13.

B. *Skidmore* is most consistent with the APA.

Acknowledging *Auer*'s severe flaws, the United States urges a sharp retreat from *Auer*. In its view, courts must give binding deference to an agency's interpretation of its own ambiguous regulation when (1) the regulation remains ambiguous after a "searching" analysis using "all the traditional tools of construction," (2) the agency's interpretation is "reasonable," (3) the agency's interpretation "was issued with fair notice to regulated parties," (4) the interpretation "is not inconsistent with the agency's prior views," (5) it "rests on the agency's expertise," and (6) it "represents the agency's considered view, as distinct from the views of mere field officials or other low-level employees." U.S. Br. 12.

Under this *Auer*-light approach, deference is not appropriate here. The ALJ's non-precedential decision was not "issued with fair notice to regulated parties," it does not rest on any agency "expertise," and it does not reflect "the agency's considered view." Not once does the government suggest that deference would be warranted here.

The government's new position is preferable to existing *Auer* deference. But the most sound outcome, both legally and practically, is to overturn *Auer*.

1. Dialing back *Auer* deference may reduce some of its pragmatic harms, but that does not create a legal foundation. The government's reformulated *Auer* doctrine still conflicts with the APA's procedural requirements (U.S. Br. 22-26), and it lacks congressional authorization (*id.* at 19-22). The government's statement that its new theory would "mitigate"—rather than

eliminate—"the tensions between *Seminole Rock* deference and the APA" (*id.* at 32) only confirms that the legal defects would remain.

Additionally, while the government's approach may ameliorate some of *Auer*'s policy flaws, it would introduce several problems of its own.

We agree that *Auer* is defective because binding deference attaches notwithstanding agency "inconsistency." U.S. Br. 31-33. As a remedy, the government would accord the agency's *first* interpretation binding deference, but not subsequent ones; changes would require notice-and-comment. *Ibid.* The government thus seeks to resurrect the *Paralyzed Veterans* doctrine that the Court rejected in *Perez*—that, to change an initial interpretive rule, an agency must resort to notice-and-comment. *Perez*, 135 S. Ct. at 1207-1208. As Justice Scalia recognized, while *Paralyzed Veterans* was "a courageous" "attempt to limit the mischief" of *Auer*, the proper remedy is to overturn *Auer* altogether. *Id.* at 1212 (Scalia, J., concurring in the judgment).

The government's approach would also create a race-to-interpret, where the first administration to construe a regulation would claim privileged legal status. That would be a bizarre, if not destructive, rule.

Separately, the government asserts that the public must have "fair notice" of a regulation through "familiar, official agency channels." U.S. Br. 31-33. But the government fails to specify whether that requires notice in the *Federal Register*, opportunity for public comment, and an obligation of the agency to respond. In the APA, Congress adopted specific procedures. See Pet'r Br. 26-31. The proper result is to hold agencies

to the APA as written, not to permit agencies to invent their own procedures that somewhat resemble it.

Tightening the standard for what qualifies as an "ambiguous" regulation (U.S. Br. 28-29) is neither a manageable nor sufficient solution. Because there is no objective measure, parties and courts would be left adrift as to *how much* ambiguity triggers deference. See *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) ("It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way."). Additional practical problems abound. Parties would dispute whether an agency has actually brought its "expertise" (U.S. Br. 33-34) to bear, including whether that is a factual or legal question. If factual, discovery disputes would ensue. The government, moreover, offers no standard to evaluate what constitutes "agency acquiescence." *Id.* at 31. And the distinction between an "agency's considered view" and "the views of mere field officials" (*id.* at 12) would occupy appellate lawyers for years.

More broadly, the Court already imposed the sort of limitations to *Auer* that the government envisions. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155-157 (2012). But *SmithKline* did not solve *Auer*'s legal or pragmatic flaws. See Nat'l Ass'n of Home Builders (NAHB) Br. 14-16.

2. There is a better way to respect agency expertise (U.S. Br. 42-43) and to provide public guidance (*id.* at 39-44), all without transgressing the APA—*Skidmore*. See Prof. Merrill Br. 19-24; Cato Br. 15-17.

Skidmore addresses the same factors that the government now identifies. It considers whether "the agency has applied its position with consistency" (*Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008)) and the agency's "formality" of procedure and "relative expertness" (*Mead*, 533 U.S. at 228). See also *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 487 (2004) (respecting views of "an expert administrator").

But *Skidmore* differs in one fundamental respect. *Auer* (including the government's diminished form) is binding deference. *Skidmore*, however, reflects an agency's "power to persuade," *not* its power to "control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). This distinction is crucial. Because it does not place a substantive thumb on the scale, *Skidmore* does not provide agencies lawmaking authority. Rather, *Skidmore* is a procedural mechanism that obligates courts to respect a coordinate branch of government, including the Executive's expertise, by giving the agency's analysis due consideration. See *Mead*, 533 U.S. at 234-235. If the court arrives at a result different from the agency, it is incumbent on the court—as a matter of inter-branch comity—to address the agency's reasoning and explain why the court disagrees.

Recent cases are illustrative. Applying *Skidmore*, the Court in *University of Texas Southwestern Medical Center* v. *Nassar*, 570 U.S. 338, 360-361 (2013), evaluated the agency's reasons and, in coming to a contrary result, explained why. See also *Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006). Alternatively, in *Alaska Department of Environmental Conservation*, 540 U.S. at 487-495, while recognizing that agencies'

views do not have "dispositive force," the Court traced the agency's arguments, explained why they were persuasive, and so gave due consideration to the views of a co-equal branch.[4]

We agree with the government (at 42-43) and the Administrative Law Scholars (at 7-9) that agencies often have special expertise. Agencies can exercise that expertise in a binding way via notice-and-comment rulemaking. That provides the regulated public an opportunity to respond, negatively or favorably, to the agency's views. Outside of notice-and-comment rulemaking, an agency's expertise deserves procedural respect. If a court disagrees, the court must explain why with specificity.

The problem with *Auer* is that it permits an agency to exert its expertise in binding fashion without any participation by the regulated public. Notwithstanding their expertise, agencies sometimes get it wrong.

II. *Stare decisis* does not justify retention of *Auer* deference.

Bound by *Auer*, the court of appeals deferred to the VA. Now, the government appears to admit that no deference is warranted. The government's own approach thus requires departure from *stare decisis*—which is no doubt the correct result.

---

[4] Limited cases could suggest that *Skidmore* has substantive weight. See, *e.g.*, *Holowecki*, 552 U.S. at 403. But *Skidmore* itself, and the heartland of its progeny, confirm that the doctrine does not provide agencies "control." *Holowecki* is best understood as occupying the far end of the "spectrum of judicial responses" (*Mead*, 533 U.S. at 228) warranted.

A. Multiple "special justifications" warrant overturning *Seminole Rock* and *Auer*. See Pet'r Br. 47-48. The failure of *Seminole Rock* or its progeny to identify a meaningful legal foundation is reason enough. *Id.* at 47. So too is the clear contradiction between *Auer* and the law governing interpretive rules. *Id.* at 47-48. Additionally, *Seminole Rock/Auer* deference is a "direct obstacle" to the realization of the policies embodied in the APA. *Id.* at 48. And, as experience has proven, *Auer* deference guts predictability. *Ibid.*[5]

B. *Stare decisis* carries less weight here because *Auer* deference is a judge-made rule of construction. See Pet'r Br. 48-50.

That "Congress remains free to alter or eliminate the doctrine" (U.S. Br. 36) misses the mark. That was equally true in *Pearson* v. *Callahan*, 555 U.S. 223, 233-234 (2009); as the Prison Litigation Reform Act illustrates, Congress retains authority to alter rules of procedure in Section 1983 litigation. The Court nonetheless held that, in the face of a "judge made" "rule," "change should come from this Court, not Congress." *Ibid.* See also *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 507 (2008) ("[T]he judiciary [cannot] wash its

---

[5] *Auer* deference also improperly vests agencies with simultaneous authority to both issue and interpret law. See Pet'r Br. 43-45; Ctr. for Constitutional Jurisprudence Br. 3-13. The government responds by pointing to justifications for *Chevron*. U.S. Br. 45-46. But "Congress cannot enlarge its *own* power through *Chevron*—whatever it leaves vague in the statute will be worked out *by someone else*." *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part). By contrast, "when an agency interprets its own rules—that is something else." *Ibid.* It improperly "[c]ombin[es] the power to prescribe with the power to interpret." *Ibid.*

hands of a problem it created[] simply by calling [the doctrine] legislative.").

The government's attempt to distinguish so-called primary and secondary conduct rules fails. See U.S. Br. 36-37. Evidentiary and procedural rules that do not address "primary conduct" (*ibid.*) certainly may bear on case outcomes. But these rules—like deference doctrines—do not warrant full *stare decisis* weight when, as here, the public does not rely upon them. See Pet'r Br. 49-50

C. *Stare decisis* has substantially less force because the public cannot legitimately rely on *Auer* deference; indeed, *Auer* undermines legal stability. See Pet'r Br. 51-53.

1. The United States responds that "[p]rivate parties have ordered their affairs in reasonable reliance on" *Auer* deference. U.S. Br. 37-44. But not a single regulated party appearing in this Court agrees. The lone brief defending *Auer* says nary a word about the regulated public's reliance interests, much less *stare decisis* as a whole.

Instead, *every* regulated party to opine has explained that *Auer* is at war with reliance interests because agency interpretations are not durable. An agency may shift its position via a press release, a policy memorandum posted to a website, or an *amicus* brief.

Business associations explain that *Auer* deference "nudges courts to acquiesce in agency actions that disrupt legitimate reliance interests" (NAHB Br. 12-16) and "upsets the expectations of regulated parties and deprives them of the notice provided through rulemaking" (U.S. Chamber Br. 3, 6-8). State and local

governments demonstrate that *Auer* "invites dramatic shifts in federal policy with each new administration." State & Local Gov't Ass'ns Br. 5. The American Immigration Lawyers Association states that "[t]he evils of *Auer* are most notable in their effects on the regulated public." NIJC & AILA Br. 17-20. And veterans' associations show that the "VA regularly advances interpretations that are intentionally vague, wildly unreasonable, or inconsistent with its past positions—all the while demanding that courts defer under *Auer*." Nat'l Org. of Veterans' Advocates (NOVA). Br. 10-21. More plainly: "Application of *Auer* deference to VA regulations harms veterans." Nat'l Veterans Legal Servs. Program (NVLSP) Br. 6-14.

These concerns are not theoretical. *Amici* have identified numerous examples of administrative flip-flops enabled by *Auer* deference. See, *e.g.*, State & Local Gov't Ass'ns Br. 13-19; Nat'l Right to Work Br. 6-11. They demonstrate several occasions where courts have endorsed constructions of regulations that are not the fairest reading. See, *e.g.*, NIJC & AILA Br. 17-20; U.S. Chamber Br. 8-14; NAHB Br. 12-16; Wash. Legal Found. Br. 7-19. States illustrate how *Auer* undermines their unique, sovereign interests. Utah Br. 11-15. And *amici* show how agencies have acted in intentionally opaque ways; the VA has admitted as much. See NOVA Br. 10-13; NVLSP Br. 20-27.

2. The government's fear of "unsettling decisions based on *Seminole Rock* deference" (U.S. Br. 37-41) is baseless. To start, there is no reason to fear any mass disruption in the lower courts or among the regulated public. See Cato Br. 17-19; NAHB Br. 26-29.

In any event, the government's argument—which rests on the contention that the regulated public has

reliance interests in *PLIVA*, *Chase Bank*, *Auer*, and *Long Island Care* (U.S. Br. 38)—defeats itself. Under the government's own test, *Auer* deference would not attach in any of these cases.

In each of *PLIVA*, *Chase Bank*, and *Auer*, the Court deferred to agency views expressed in briefs. That is one of the very ills the government recognizes with *Auer*. See U.S. Br. 19. (If the government's rule is meant to retain agency lawmaking-by-*amicus*-brief, it is not a retraction from *Auer* at all.)

Long Island Care v. *Coke*, 551 U.S. 158, 170-171 (2007), hit a trifecta of *Auer* flaws: the Court deferred to a non-public advisory memorandum, the memorandum was "written in response" to that litigation, and the memorandum was inconsistent with the agency's past positions. See U.S. Br. 19. The government's need to use these cases to make its public reliance argument speaks volumes.

3. The government posits that *Auer* deference, once narrowed to preclude agency flip-flops, would enhance predictability by insulating "the agency's" interpretation from judicial review. U.S. Br. 40. As the government sees it, courts will all fall in line, precluding review by this Court (*id.* at 40-42), and private parties will not have a meaningful opportunity anyway to challenge agency action (*id.* at 43-44). To the extent these arguments hold merit (earlier in its brief, at 26, the government appears to take the opposite view), the regulated public does not seek predictability in a vacuum. The public is entitled to participate in, and seek judicial review of, agency actions that impact their interests. The APA provides both predictability *and* substantive protections. That framework—and not any variation on *Auer*—should govern.

III. Petitioner offers the best reading of Section 3.156(c).

The government does not dispute that reconsideration under Section 3.156(c) has three elements: (1) the VA originally erred by failing to consider a service record in its possession; (2) the service record is "relevant"; and (3) the VA later grants an award, per the usual standards, "based" at least "in part" on the record it initially overlooked. Pet'r Br. 55.

Nor does the government deny that petitioner has satisfied the first and third elements: the VA originally erred by failing to consider his service records (Pet'r Br. 55-56), and, when the VA granted petitioner benefits, its award was "based" "in part" on those records (*id.* at 56). See also AFL-CIO Br. 23-24.

Instead, the government contends that service records are "relevant" only if they demonstrate that "the VA would have reached a different result at the time of its prior decision had it considered the additional records" (U.S. Br. 49)—and not if they are "relevant" to the veteran's claim generally. The government's two arguments are not persuasive, and they pale in comparison to our position, much of which the government disregards.

A.1. The government begins by asserting that the "matter at hand" in Section 3.156(c) is the "VA's prior decision denying the veteran's claim." U.S. Br. 49. But the government has no textual support for that contention.

The regulatory text makes plain that the "official service department records" must be "relevant" to the veteran's "*claim*." It provides:

> [A]t any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section.

38 C.F.R. § 3.156(c)(1). The triggering event, accordingly, is the VA "associat[ing] with the *claims file*" material that is an "official service department record[]" and that should have been "associated with the *claims file*" the first time. What goes into the "*claims* file"? Documents that are "relevant" to the veteran's "claim."

In promulgating the current regulation, this is precisely how the VA understood it would work: "If a newly discovered service department record is one that VA *should have received at the time* it obtained the veteran's service medical records, we believe it ordinarily would be within the scope of proposed [Section] 3.156(c)(1)." 71 Fed. Reg. 52,455 (emphasis added). A "relevant" record is one that belonged in the "claims file" at the time of the original adjudication.

Assuming, for the sake of argument, that the "official service department records" must be "relevant" to the "VA's prior decision denying the veteran's claim" (U.S. Br. 49.), these records still qualify. They bear on whether an in-service event occurred and the likelihood that petitioner suffered from PTSD—both of which were elements of the original adjudication. See Pet'r Br. 57-58 & n.16. Indeed, Dr. Davies criticized Dr. Henderson's 1983 report (on which the government solely relies, see U.S. Br. 48) because Dr. Henderson "misunderstood the impact of [petitioner's]

war trauma upon him." JA38. Petitioner's war trauma was undeniably a fact "of consequence in determining the action." Fed. R. Evid. 401. The records documenting it were thus "relevant" ones. *Ibid.*

The government argues that the service records are not "relevant" because they reveal facts that "no one disputed." U.S. Br. 48. But it is long settled that evidence is "relevant" even if "'[t]he fact to which the evidence is directed'" is not "'in dispute.'" *Old Chief* v. *United States*, 519 U.S. 172, 179 (1997) (quoting Advisory Committee's Notes on Fed. R. Evid. 401). Federal Rule of Evidence 403 exists because—and expressly recognizes that—evidence may be both "relevant" and "cumulative." (By contrast, the regulation excludes "cumulative" evidence from the meaning of the defined term "material." 38 C.F.R. § 3.156(a). See pages 20-21, *infra*.)

The government's actual contention is that the regulation's use of "relevant" should be interpreted as "dispositive." While the government studiously avoids the language now, the Board of Veterans' Appeals focused on whether the service records are "outcome determinative." Pet. App. 42a-43a. But "relevant" does not mean "dispositive" or "outcome determinative." See Pet'r Br. 57; 38 U.S.C. § 101(35) (defining "relevant evidence" as "evidence that tends to prove or disprove a matter in issue"); *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 436 (2006) (distinguishing "relevant" and "dispositive").

2. The government further asserts that the "hallmark of reconsidering * * * is that the VA concludes that its prior decision on the claim was incorrect *ab initio*." U.S. Br. 49. But the government has no textual

support for this contention, either. In fact, the text explains that the "hallmark of reconsidering" (*ibid.*) is an earlier VA *procedural* error—the VA's failure to "associate[]" records in the government's possession with the "claims file." 38 C.F.R. § 3.156(c)(1).

Section 3.156(c)(3) strongly supports our argument. To trigger reconsideration, the VA's award must be "based" at least "in part" on the overlooked records. See Pet'r Br. 55. Here, the VA *did* rely on the overlooked records when it granted petitioner benefits. JA51-52. See also AFL-CIO Br. 23-24. The government admitted as much earlier. BIO 16 n.2. This confirms that the evidence is "relevant."[6]

B. Several other aspects of the regulatory text and structure require our construction.

First, the government improperly renders "relevant" identical to the "new and material evidence" standard that governs reopening under Section 3.156(a). See Pet'r Br. 57-59. "Material evidence" must relate to "an unestablished fact necessary to substantiate the claim" and may not be "cumulative []or redundant" of existing evidence. 38 C.F.R. § 3.156(a). That is the same as the government's preferred test here. See U.S. Br. 48-49. But, as we have shown, "relevant" is more expansive. See Fed. R. Evid. 401.[7]

---

[6] Section 3.156(c)(4) also bolsters our conclusion. See AFL-CIO Br. 22-23.

[7] *Webster's Third New International Dictionary* (1961) confirms that, in ordinary usage, "relevant" and "material" differ in degree. "A thing is RELEVANT when it has a connection * * * with a matter under consideration." *Id.* at 1917. "A thing is MATERIAL when it has so close a relationship with a case in hand that

The government responds that Section 3.156(a)'s "new and material evidence" standard is actually "broader" than and subsumes Section 3.156(c). U.S. Br. 51. The government alternatively contends that the different language has the same meaning. *Id.* at 51-52.

The regulation's text forecloses these arguments. It provides that a veteran may satisfy the requirements of Section 3.156(c) "*notwithstanding* paragraph (a) of this section." 38 C.F.R. 3.156(c)(1) (emphasis added). Section 3.156(c) must apply in circumstances outside the scope of Section 3.156(a), or else this "notwithstanding" clause would be meaningless.

Additionally, the VA amended "material" out of Section 3.156(c), replacing it with the broader term "relevant." See Pet'r Br. 58-59; AFL-CIO Br. 22. If the VA had actually intended for reopening to hinge on the defined concept of "material" evidence (see 38 C.F.R. § 3.156(a)), the VA would have retained that term.

We made both arguments earlier (Pet'r Br. 58-59), but the government responds to neither. For these two reasons, "relevant" must be a broader standard than "material"—a conclusion irreconcilable with the government's construction.

Nor does the government's construction meaningfully distinguish between "relevant" and "material." The government asserts that "material" evidence in Section 3.156(a) "need not suggest that the VA's prior decision on the claim was incorrect *at the time*." U.S.

---

it cannot be dispensed with without serious alteration of the case." *Ibid.*

Br. 51 (emphasis added). But that is just wordplay; under the government's view, "material" and "relevant" mean the same thing. And Section 3.156(c) is limited to "official service department records" (*ibid.*) because of the regulation's use of those specific words, not because of the term "relevant."

Our construction—not the government's—properly captures the different meaning of these words.

Second, the regulation states unequivocally that "relevant official service department records" "include" "[s]ervice records that are related to a claimed in-service event." 38 C.F.R. § 3.156(c)(1)(i). That is what these records are. See Pet'r Br. 56-57 & n.15. Unable to muster a response, the government disregards our argument.

Third, current Section 3.156(c) was promulgated against the backdrop of then-recently-enacted 38 U.S.C. § 5103A(c). That statute's usage of "relevant records" accords with our construction. See Pet'r Br. 59. These two provisions dovetail: Section 5103A(c) obligates the VA to locate records to assist the veteran, and Section 3.156(c) provides the remedy when the VA errs. The government fails to explain why "relevant" should have different meanings in these related provisions.

Fourth, we showed that the pro-veteran and anti-drafter canons resolve any lingering ambiguity. See Pet'r Br. 59-61; NOVA Br. 23-29; NVLSP Br. 6-7. Once more, the government is silent.

C. The government rests heavily on its policy argument—that our construction could leave some veterans in a "*better* position" than if the VA had made

no underlying error. U.S. Br. 52. But the government fails to address this regulation's remedial nature.

The government's construction requires a counterfactual inquiry about what the VA would have done, often decades earlier, had it not made an error. Because the veteran bears the burden of proof (see 38 U.S.C. § 5107(a)), that speculative analysis is a recipe for mass under-compensation of veterans.

It is often impossible to determine with confidence the precise effect that overlooked evidence would have had on the original claim adjudication. Not only might the evidence influence the ultimate decisionmaker, but it would also be in the record for doctors and therapists to consider when they prepare their medical reports.

Moreover, when seeking reconsideration, a veteran will often present (as petitioner did here) *both* the evidence that the VA overlooked *and* new medical evidence confirming the injury. Under the government's approach, VA adjudicators would have wide discretion to reject claims for retroactive benefits by heavily weighting the new medical evidence.

These concerns are magnified by the VA's history of irrational claims administration (see Sergeant Major Jeff Howard Br. 9-13) and the "VA's penchant for unreasonable litigating positions." NOVA Br. 21-23 (summarizing alarming statistics).

As we construe it, the VA's reconsideration mechanism operates far more objectively. The veteran must show that the VA procedurally erred by failing to evaluate records the government possessed, that the records are relevant to the veteran's claim, and that, when the VA later awarded benefits (pursuant

to the traditional standards), it relied in part on the records it previously overlooked. See Pet'r Br. 55.

The government's main objection is that this construction could overcompensate some veterans, including, the government insinuates, petitioner. U.S. Br. 52. But our construction is equitable, both here and more generally.

In awarding petitioner benefits, the VA credited Dr. Davies' 2007 evaluation. JA52. In it, Dr. Davies explained that petitioner has had PTSD since around 1980 and that Dr. Henderson bungled his analysis. JA37-38. In sum, the evidence demonstrates that petitioner should have received benefits when he originally applied in 1982 *and* that the VA erred when it first adjudicated his claim.

More generally, it was reasonable for the VA to select a procedure that might overcompensate some veterans rather than one that would undercompensate many.[8] Not only is our construction true to the regulation's text, but it also evinces the VA's interest in providing a fair procedure for remedying its past errors. Our veterans deserve no less.

If the VA has since changed its view, it may amend the regulation through notice-and-comment rulemaking.

---

[8] Allocating the risk of loss this way also incentivizes the VA to avoid errors. Under the government's approach, VA errors would, in the aggregate, result in financial advantage to the government at the expense of veterans.

CONCLUSION

The Court should reverse the judgment entered below.

Respectfully submitted.

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW J. PINCUS
CHARLES A. ROTHFELD
E. BRANTLEY WEBB
ANDREW A. LYONS-BERG
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

RACHEL R. SIEGEL
Mayer Brown LLP
1221 Ave. of the Americas
New York, NY 10020
(212) 506-2500

Counsel for Petitioner

MARCH 2019

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF AFFIRMANCE

RONALD M. LEVIN
William R. Orthwein Distinguished Professor of Law
WASHINGTON UNIVERSITY SCHOOL OF LAW
Campus Box 1120
St. Louis, MO 63130

GILLIAN E. METZGER
Stanley H. Fuld Professor of Law
CENTER FOR CONSTITUTIONAL GOVERNANCE
COLUMBIA LAW SCHOOL
435 W. 116th Street
New York, NY 10027

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004
(202) 220-1100
Donald.Verrilli@mto.com

Counsel for Amici Curiae *Administrative Law Scholars*

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. *Auer* is a Sound Administrative Law Doctrine. 5

A. *Auer* reflects the most sensible allocation of authority between agencies and courts both as a pragmatic matter and as a matter of principle. 5

B. Petitioner's criticisms of *Auer* deference are unfounded. 9

1. Meaningful Review 9

2. No aggrandizement 16

3. No inconsistency with the APA's rulemaking provisions and the values they further 21

4. No inadequacy of procedure 24

II. *Auer* Deference Raises No Issue Under the Constitution or the Administrative Procedure Act. 26

A. *Auer* deference is fully consistent with the Constitution's separation of powers. 26

TABLE OF CONTENTS
(continued)

Page

B. *Auer* deference is fully consistent with Section 706 of the APA. 30

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

American Tel. and Tel. Co. v. United States,
299 U.S. 232 (1936) 5

Auer v. Robbins,
519 U.S. 452 (1997) ..... passim

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 5, 14, 15, 31

Chase Bank USA, N.A. v. McCoy,
562 U.S. 195 (2011) 24

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) ..... passim

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 11, 14, 24, 26

City of New York v. Permanent Mission of India to UN,
618 F.3d 172 (2d Cir. 2010) 24

Decker v. Northwest Environmental Defense Center,
568 U.S. 597 (2013) 17, 28

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Epilepsy Found. of Ne. Ohio v. NLRB,
268 F.3d 1095 (D.C. Cir. 2001) 22

FCC v. Fox Television Stations, Inc.,
567 U.S. 239 (2012) 22

FCC v. Pottsville Broadcasting Co.,
309 U.S. 134 (1940) 5

FTC v. Cement Institute,
333 U.S. 683 (1948) 29

Glen Alden Coal Co. v. NLRB,
141 F.2d 47 (3d Cir. 1944) 5

Gonzales v. Oregon,
546 U.S. 243 (2006) 12

Green Valley Creamery v. United States,
108 F.2d 342 (1st Cir. 1939) 6

Independent Training & Apprenticeship Program v. California Dep't of Indus. Relations,
730 F.3d 1024 (9th Cir. 2013) 14

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 14

Managed Pharmacy Care v. Sebelius,
716 F.3d 1235 (9th Cir. 2013) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 26

Marcello v. Bonds,
349 U.S. 302 (1955) 28

Martin v. OSHRC,
499 U.S. 144 (1991) 6, 7, 8

Methodist Hosp. of Sacramento v. Shalala,
38 F.3d 1225 (D.C. Cir. 1994) 24

Morgan Stanley & Co. v. SEC,
126 F. 2d 325 (2d Cir. 1942) 5

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983) 19

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 21

NLRB v. J.S. Popper, Inc.,
113 F.2d 602 (3d Cir. 1940) 6

Norwegian Nitrogen Products Co. v. United States,
288 U.S. 294 (1933) 5

Perez v. Loren Cook Co.,
803 F.3d 935 (8th Cir. 2015) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015) ..... passim

Pharmaceutical Research & Mfrs. of Am. v. Thompson,
362 F.3d 817 (D.C. Cir. 2004) 25

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 21, 22

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 14, 15, 16, 27

Talk America, Inc. v. Michigan Bell Tel. Co.,
564 U.S. 50 (2011) 17

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 7, 11

TVA v. Hill,
437 U.S. 153 (1978) 8

United States v. Eaton,
169 U.S. 331 (1898) 2, 5

United States v. Mead Corp.,
533 U.S. 218 (2001) 24, 25

United States v. Williams,
553 U.S. 285 (2008) 22

TABLE OF AUTHORITIES
(continued)

Page(s)

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 30

Walling v. Cohen, 140 F.2d 453 (3d Cir. 1944) 6

Withrow v. Larkin, 421 U.S. 35 (1975) 28

FEDERAL STATUTES

5 U.S.C. § 553(a)(1) 24

5 U.S.C. § 553(a)(2) 24

5 U.S.C. § 553(b)(B) 24

5 U.S.C. § 706 ..... 4, 29

38 U.S.C. § 7104(c) 21

38 U.S.C. § 7251 20

38 U.S.C. § 7252 20

38 U.S.C. § 7281(h) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

LEGISLATIVE MATERIALS

Administrative Procedure Act: Legislative History, S. Doc. No. 79-248 (1946) 30

OTHER AUTHORITIES

Cynthia Barmore, *Auer in Action: Deference After* Talk America, 76 Ohio St. L.J. 813 (2015) 12

Blake Emerson & Cheryl Blake, Admin Conference of the U.S., *Plain Language in Regulatory Drafting: Final Report* (Dec. 8, 2017), https://www.acus.gov/sites/default/files/documents/Plain%20Regulatory%20Drafting_Final%20Report.pdf 19

Kristin E. Hickman & Matthew Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235 (2007) 15

Ronald M. Levin, *Auer and the Incentives Issue*, 36 Yale J. On Reg.: Notice & Comment (Sept. 19, 2016), http://yalejreg.com/nc/*Auer*-and-the-incentives-issue-by-ronald-m-levin/ 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 Law & Contemporary Problems 1 (1998) 19

Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992) 19

Aaron L. Nielson, *Beyond Seminole Rock*, 105 Geo. L.J. 943 (2017) 23

Richard J. Pierce, Jr., & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515 (2011) 12

James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. Ann. Surv. Am. L. 251 (2010) 25

Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Admin. L. Rev. 1139 (2001) 22

TABLE OF AUTHORITIES
(continued)

Page(s)

Kevin M. Stack, *The Interpretive Dimensions of Seminole Rock*, 22 Geo. Mason L. Rev. 669 (2015) 11

E. Blythe Stason, *"Substantial Evidence" in Administrative Law*, 89 U. Pa. L. Rev. 1026 (1941) 10

Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 Geo. Wash. L. Rev. 1449 (2011) 7

Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093 (1987) 23

Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984) 27

Cass R. Sunstein, *Chevron as Law*, Geo L.J. (forthcoming), https://ssrn.com/abstract=3225880 31

Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297 (2017) .....passim

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 30

Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999 (2015) 16

Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effect on Agency Rules*, 119 Colum. L. Rev. 85 (2019) 17, 18, 19

William Yeatman, Note, *An Empirical Defense of Auer Step Zero*, 106 Geo. L. J. 515 (2018) 13

INTEREST OF THE AMICI CURIAE[1]

Amici are professors of law who focus on the fields of administrative law and government regulation. They have extensively studied and written on administrative law doctrines of judicial review, including *Auer* deference. They have a strong interest in how the Court's decision in this case will affect administrative law.

Amici include:[2]

Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University School of Law

Gillian E. Metzger, Stanley H. Fuld Professor of Law, Co-Faculty Director, Center for Constitutional Governance, Columbia Law School

Anne Joseph O'Connell, Professor of Law, Stanford Law School.

Peter M. Shane, Jacob E. Davis and Jacob E. Davis II Chair in Law, The Ohio State University, Moritz College of Law

---

[1] All parties have filed blanket consents to the filing of briefs *amicus curiae*. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] Amici join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of positions advocated.

Kevin M. Stack, Lee S. & Charles A. Speir Professor of Law, Vanderbilt Law School

Adrian Vermeule, Ralph S. Tyler Professor of Constitutional Law, Harvard Law School.

SUMMARY OF THE ARGUMENT

The presumption that reviewing courts should defer to agency interpretations of their own regulations, as set forth in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), is sound and should be maintained. As this Court has recognized for more than a century, see *United States v. Eaton*, 169 U.S. 331, 343 (1898), deference to an administrative agency's interpretation of ambiguities in the regulations it implements is amply justified on pragmatic grounds and as a matter of principle. Agencies possess technical and policy expertise that reviewing courts generally lack. They are therefore in a far better position to discern which interpretation of an ambiguous regulation will best advance the policy objectives the agency is charged with achieving in a variety of complex regulatory and factual contexts. At the same time, deference promotes democratic accountability by ensuring that these discretionary and inevitably policy-inflected judgments are made by an elected Executive that can be held responsible for its judgments and actions, rather than by unelected judges.

The objections to *Auer* deference advanced by Petitioner and his supporting amici lack merit, and do not come close to providing a justification for overruling *Auer* and abandoning the longstanding and sensible approach to judicial review that *Auer* reflects.

Auer deference is hardly an abdication of the judicial role. Reviewing courts decide whether an agency regulation at issue is ambiguous; whether the agency's interpretation is within the scope of interpretive choices that ambiguity affords; whether the interpretation is arbitrary or unreasonable; whether there is reason to suspect that the agency's interpretation does not reflect its fair and considered judgment; whether the interpretation creates a risk of unfair surprise because it conflicts with a prior interpretation of the agency or appears to be nothing more than a convenient litigating position; whether the agency has explained its reasoning; and whether its reasoning is arbitrary and capricious. These limitations on agency discretion, which have emerged over time in light of experience as courts have considered agency interpretations of ambiguous regulations in a variety of contexts, respond effectively and proportionately to the concerns of *Auer*'s critics about an excessively deferential judicial role.

The principal consequentialist argument against *Auer* deference—that it creates incentives for agencies to promulgate broad and ambiguous regulations that afford agency decision-makers maximum flexibility to make basic policy choices while avoiding Administrative Procedure Act (APA) procedural requisites for rules with binding effect—likewise lacks any foundation. Whether or not such an incentive exists in theory, there is no evidence that it has an appreciable impact in the real world. Indeed, powerful forces push agencies in precisely the opposite direction. Clear and specific regulations respond to the expressed needs of regulated entities for guidance sufficient to allow them to order their affairs; they also enhance the effectiveness of agency regulatory enforcement. Clarity and

specificity also improve the prospects that regulations will be upheld when challenged as arbitrary and capricious under the APA. Moreover, promulgating detailed and precise regulations also reduces the discretion of future agency administrators, whose policies, views, and values may be quite different, to redirect agency policy in significant ways simply by exploiting ambiguities in existing regulations.

Most fundamentally, *Auer* deference is entirely consistent with the Constitution's separation of powers and with the APA. *Auer* effects no transfer of the judicial power to agencies and instead leaves courts ample room to police agency interpretations of regulations. The field of administrative law has worked out a variety of political and judicial oversight mechanisms to maintain a balance of power among the branches of government. When an agency action is questioned as possibly erroneously interpreting a regulation, all of those mechanisms apply in the same way as they usually do in the case of other administrative actions. The relevant separation-of-powers question for courts is whether the agency has acted within the scope of authority Congress has delegated to it, not whether it is combining lawmaking and law-interpreting functions—as such commingling of functions has been a common and uncontroversial feature of public administration for more than a century. Finally, against that backdrop, there is no reason to read Section 706 of the APA (which instructs courts reviewing agency action to decide "all relevant questions of law") as forbidding courts from affording agency interpretations of ambiguous regulations the deference they have historically afforded them. Its language does not require that reading; nor does its history show any intention to prevent such deference.

ARGUMENT

I. *Auer* is a Sound Administrative Law Doctrine.

A. *Auer* reflects the most sensible allocation of authority between agencies and courts both as a pragmatic matter and as a matter of principle.

Judicial deference to administrative agency interpretations of the regulations they administer did not start with *Auer*. It dates back at least to the nineteenth century. *United States v. Eaton*, 169 U.S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them, is entitled to the greatest weight, and we see no reason in this case to doubt its correctness."). And this Court's 1945 decision in *Seminole Rock* setting forth the principle that courts should defer to agency interpretations of ambiguous regulations was hardly the bolt from the blue (or idiosyncratic context-specific decision) that Petitioner and his supporting amici claim. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Instead, that decision built upon a substantial body of precedent.[3]

---

[3] In *Seminole Rock*, the brief for the United States, written by Professor Henry Hart, invoked that body of precedent. See Brief for Petitioner, *Seminole Rock*, No. 914, at 20–21 (O.T. 1944) (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n.6 (1940); cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 325 (1933); *American Tel. and Tel. Co. v. United States*, 299 U.S. 232, 242 (1936); *Morgan Stanley & Co. v. SEC*, 126 F. 2d 325 (2d Cir. 1942)). The brief's list of precedent was not exhaustive. See, e.g., *Glen Alden Coal Co. v. NLRB*, 141 F.2d 47, 52 (3d

This doctrine of deference has deep historical roots for a reason: it strikes the most appropriate, and democratically legitimate, accommodation of the role of the Executive in administering the law and the role of the courts in ensuring that the Executive carries out that function in conformity with the rule of law.

Auer deference reflects appropriate respect for the superior fact-finding and policy-making capabilities of administrative agencies. It is inevitable that interpretation and judgment will be required in decisions about how agency regulations are to be applied. No amount of care and diligence will ensure that an agency promulgating a regulation has accounted for every possible question that could arise concerning its meaning. That is precisely why they need latitude when they utilize regulatory tools other than notice-and-comment rulemaking, such as interpretive rules and adjudicatory procedures, to address the often-difficult questions of application. As this Court has explained, "applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives." *Martin v. OSHRC*, 499 U.S. 144, 151 (1991). Often the agency will have direct knowledge of what the regulation was intended to mean, or at least the purposes it was designed to serve. See *id.* at 152 ("Because the Secretary promulgates these standards, the Secretary

---

Cir. 1944); *Walling v. Cohen*, 140 F.2d 453, 456 (3d Cir. 1944); *NLRB v. J.S. Popper, Inc.*, 113 F.2d 602, 603–04 (3d Cir. 1940); *Green Valley Creamery v. United States*, 108 F.2d 342, 347 (1st Cir. 1939).

is in a better position than is the Commission to reconstruct the purpose of the regulations in question.").

Sometimes, to be sure, an agency faces a question it did not anticipate when it promulgated the regulation, or its interpretation of the regulation has changed. Even then, *Auer* deference remains fully appropriate. Judgments about what an agency regulation "means" in this context will inevitably entail judgments about how specific regulatory requirements, and underlying policy objectives, are best implemented in highly specific factual settings. Making such judgments is at the core of agency competence. And it is a competence that courts generally lack. *Auer* deference is particularly important when a "regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted); see also Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 Geo. Wash. L. Rev. 1449, 1456–58 (2011).

It is for all these reasons that this Court has recognized that the "power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. OSHRC*, 499 U.S. 144, 151 (1991). Critics of *Auer* thus miss the point in arguing that the standard forces a court to shun the "best reading" of the regulation. *Auer* is a longstanding, sensible guidepost to *identifying the best reading*.

Allocating decisional responsibility in this way also furthers essential principles of democratic accountability. In this respect, *Auer* deference rests on the same fundamental premise as *Chevron* deference to agency interpretations of the statutes they are charged with implementing:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . . *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

Questions of application reflect legitimate policy choices fully as much as decisions about which regulatory provisions to promulgate. And the Executive is just as accountable to the people for judgments about those policy choices as for the policy choices that determine which regulations should be enacted in the first place. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Id.* (quoting *TVA v.*

Hill, 437 U.S. 153, 195 (1978). Petitioner would, however, displace the decisional authority of these politically accountable actors with that of unelected judges.

The present case amply illustrates the practical and conceptual soundness of *Auer* deference. The reading of "relevant" that the BVA and CAVC adopted was evidently based on a recognition that Petitioner's broad interpretation would undermine the purposes of the carefully delimited provision for "reconsidering" (as opposed to "reopening") the earlier VA decision. The Federal Circuit was quite right to rely on the administrative authorities' sense of how the program should work, after it found that other arguments presented to it, such as the use of the word "relevant" in other legal contexts, were inconclusive.

B. Petitioner's criticisms of *Auer* deference are unfounded.

1. Meaningful Review. *Auer* reflects a proper understanding of the judicial role in reviewing agency action. The contrary claims by Petitioner and his supporting amici are baseless.

Petitioner says that "[w]hen there is more than one reasonable interpretation of a regulation, *Auer* authorizes an agency to pick the interpretation it favors as a policy matter–and gives that choice the force and effect of law." Pet. Br. at 25.[4] This argument misconceives

---

[4] Respondent similarly objects to "the seeming incongruity of giving controlling weight to an interpretive rule that is not meant to carry the force of law." Resp. Br. at 26. To the extent Respondent's concern is about the supposed tension between *Auer* and the APA's distinction between legislative and interpretive rules, that

the manner in which the term "controlling" is used in *Auer*. An agency's interpretation of a regulation is afforded "controlling weight" *only* if it is not "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461. In fact, *Auer* deference is similar to countless statutes providing "[t]he findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive" or containing very similar language. E. Blythe Stason, *"Substantial Evidence" in Administrative Law*, 89 U. Pa. L. Rev. 1026, 1026–29 (1941). These statutory provisions have never been understood as commands to accord agency decisions conclusive effect with inconsequential exceptions. To the contrary, they simply mean that the standard of review is substantial evidence.

Thus, *Auer* is properly understood as a standard of review much like others that govern judicial review of agency action, not as an abdication of judicial responsibility. To begin with, it is up to the reviewing court to evaluate whether an agency's interpretation of a regulation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. The agency's interpretation is given controlling weight only if it passes muster under that standard. As this Court explained in *Perez v. Mortgage Bankers Association*, "[e]ven in cases where an agency's interpretation receives *Auer* deference . . . it is the court that ultimately decides whether a given regulation means what the

---

concern—despite the length at which it is discussed in Respondent's brief, Resp. Br. 22–26—is out of place in this case, which developed out of adjudication and does not involve an interpretive rule at all.

agency says." 135 S. Ct. 1199, 1208 n.4 (2015). Courts apply standard interpretive tools to make that determination, just as they do when reviewing agency interpretations of the statutes they administer under *Chevron*. Just as under *Chevron*, reviewing courts can and do conclude that the regulation under review is not ambiguous and deny the agency's interpretation any deference on that basis. And—again, just as under *Chevron*—whether a reviewing court defers to an agency's interpretation of a regulation often depends on the interpretive methodology it employs, rather than the scope of review. See Kevin M. Stack, *The Interpretive Dimensions of Seminole Rock*, 22 Geo. Mason L. Rev. 669, 679–82 (2015).

This Court has long made clear, moreover, that "*Auer* deference is not an inexorable command in all cases." *Perez*, 135 S. Ct. at 1208 n.4. In *Christopher v. SmithKline Beecham Corporation*, this Court held that reviewing courts will not defer to an agency interpretation "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment." 567 U.S. 142, 155–56 (2012) (citation and internal quotation marks omitted). An agency's interpretation may receive no deference if it creates a risk of "unfair surprise," "conflicts with a prior interpretation," or appears to be "nothing more than a convenient litigating position." *Id.* (citation and internal quotation marks omitted). See also *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) ("[A]n agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view" (citations and internal quotation marks omitted)). And courts will not defer to agency inter-

pretations of regulations where "the underlying regulation does little more than restate the terms of the statute itself." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

More broadly, agency interpretations of regulations must satisfy the basic requisites applicable to agency action under the APA. Agency interpretations must be adequately explained. They must be sufficiently well reasoned and supported to survive review under the arbitrary and capricious standard. If the agency's interpretation deviates from prior policy the agency must provide a reasoned basis for the change. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).

In all of these respects, reviewing courts retain a robust role in ensuring that agency interpretations of ambiguous regulations reflect respect for rule of law values, principles of sound decision-making, and fairness to regulated entities and the public.[5] And, unsur-

---

[5] Empirical studies do not support concluding that *Auer* is dramatically different in impact from other common deference doctrines. One study "suggests that district courts and circuit courts apply *Auer*/*Seminole Rock* deference in about the same manner as they and the Supreme Court apply the other deference doctrines that have been subjected to empirical study." Richard J. Pierce, Jr., & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 Admin. L. Rev. 515, 520 (2011). A later study, examining cases decided from 2011 to 2014, suggested that the criticism of *Auer* in Supreme Court opinions has led to a downward trend in affirmance rates, ending up at 70.6%. Cynthia Barmore, *Auer in Action: Deference After* Talk America, 76 Ohio St. L.J. 813, 827 (2015). A more recent study found that "the federal government prevailed in 74% of cases when the court invoked *Auer* and in 68% of cases when it

prisingly, the doctrine of *Auer* deference has not remained static over time. It has evolved as courts, through the accumulation of experience, come to recognize the ways in which deference should be cabined to ensure that agency action conforms to these fundamental values and principles. There is no reason why courts cannot continue to shape the doctrine incrementally to the extent future cases illuminate the need for further refinement. Such an approach reconciles the competing values and interests at stake far better than Petitioner's proposal to abandon deference altogether and transfer to unelected judges the responsibility to decide upon the "best" way to resolve the policy and practical questions that often underlie disputes about regulatory interpretation. If this Court is of the view that reviewing courts are not currently striking that balance in an appropriate fashion, it can and should direct courts to be more conscientious in their application of governing principles. Overruling *Auer* would be a "cure" much worse than any disease.

A similarly dubious "cure" is Respondent's proposal to "narrow" *Auer* by imposing various strict threshold conditions on its applicability. We see no reason for such a procrustean solution. On the contrary, as this Court's *Auer* jurisprudence demonstrates, the normal case-by-case method is well able to develop tailored responses to potential misuse while preserving the benefits of *Auer* and avoiding overgeneralizations. For example, whereas Respondent would deny *Auer*

---

invoked *Chevron*," but the study covered a twenty-year period, from 1993 to 2013, and the data showed that the government's win rate when invoking *Auer* "fell significantly" after 2006, to 71%. William Yeatman, Note, *An Empirical Defense of Auer Step Zero*, 106 Geo. L. J. 515, 519–20 (2018). The study concluded that "*Auer* is no longer super deference." *Id.* at 547.

deference whenever an agency has changed its interpretation, Resp. Br. at 30–33, *Christopher* identified "conflict[] with a prior interpretation" as simply one of several factors that "*might*" signal *Auer* deference was unwarranted. 567 U.S. at 155 (emphasis added). Courts have heeded this message. See *Perez v. Loren Cook Co.*, 803 F.3d 935, 939, 940–43 (8th Cir. 2015) (refusing to defer to changed interpretation on grounds, *inter alia*, of "unfair surprise"); *Independent Training & Apprenticeship Program v. California Dep't of Indus. Relations*, 730 F.3d 1024, 1035 (9th Cir. 2013) (same). But there is no reason to transform *Christopher*'s "might" into "must." As a unanimous Court stated in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007), "as long as interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation."

Petitioner and several amici urge replacing *Auer* deference with *Skidmore* deference, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see, e.g., Pet. Br. at 43; Merrill Br. at 19–24, even contending that such a change would have limited impact in practice.[6] Cato Br. at 15–19. In assessing such claims, it

---

[6] Perhaps seeking to minimize the distinction between *Auer* and *Skidmore*, Amici Cato et al. argue that "the government's brief in *Seminole Rock* explicitly cited the *Skidmore* principle," making the decision "an unremarkable application of . . . *Skidmore*"). Cato Br. at 16–17; see also Resp. Br. at 16 (stating that the brief "argued for deference primarily on the basis of *Skidmore*."). A reading of the full passage in the Government's brief in that case shows that it by no means equated the two standards:

is important to be clear about what such a move would entail, as *Skidmore* is notorious for the broad variety of approaches it encompasses in various judges' hands. See Kristin E. Hickman & Matthew Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1250–71 (2007). A reading of the briefs just mentioned confirms that lack of consensus about *Skidmore*'s meaning. If *Skidmore* is read as instructing courts to accept agency interpretations of regulations once courts are independently "persuaded" that such interpretations are correct, see Hickman & Krueger, *supra*, at 1251–55, then the distance between *Auer* and *Skidmore* is substantial and the benefits of *Auer* would be lost; indeed, this version of *Skidmore* hardly qualifies as deference at all. If, on the other hand, *Skidmore* is read as embodying a presumption that courts will accept reasoned agency interpretations that are consistent with the regulation (and statutes) at issue and supported by the record, subject to

---

> Whatever qualifications there may be upon the rule which attributes weight to a settled administrative construction, such a construction cannot be ignored even when it involves only the Administrator's views as to the meaning of the statute under which he is operating. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137–140. The weight to be given to his construction of his own regulations should obviously be much greater; for then he is explaining his own intention, not that of Congress. This Court has gone so far as to say that the latter type of "interpretation is binding upon the courts." [citing the cases listed in note 2 supra]. It is not necessary to go that far here, however, inasmuch as the construction adopted by the court below is wholly without merit.

Brief for Petitioner, *Seminole Rock*, No. 914, at 20–21 (O.T. 1944). "[O]bviously . . . much greater" hardly suggests an equivalency between the two standards.

certain exceptions, then the distance between *Auer* and *Skidmore* may be minimal. But in that case, it is hard to see what would justify the confusion and outcry entailed by "overruling" *Auer* and replacing it with a substantively similar *Skidmore*.

2. No aggrandizement. Petitioner's argument that *Auer* deference facilitates a bureaucratic power-grab, Pet. Br. at 37–38, is also unsupported. Whatever the theoretical allure of the argument that *Auer* induces agencies to write vague regulations, it does not survive an encounter with actual experience. Petitioner and his supporting amici have come up with no real factual support—not even anecdotal evidence, much less solid empirical analysis—to back up this criticism of *Auer*.[7] Cass R. Sunstein & Adrian

---

[7] As his only evidence supporting the critique, Petitioner cites a study conducted by Professor Walker. Pet. Br. at 38 n.3 (citing Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999 (2015)). Walker sent surveys to agency rule drafters asking whether different deference doctrines played a role in their rule-drafting decisions. 67 Stan. L. Rev. at 1072–73. Among respondents, 39% said they used *Seminole Rock/Auer* in their rule drafting, far fewer than the number who said they used *Chevron* (90%) or *Skidmore* (62%). *Id.* at 1061. Due to space limits, rule drafters were not asked how they "use" *Auer* deference when drafting regulations, *id.* at 1065–66; "use" might mean nothing more than that rule drafters remain mindful of relevant judicial review standards, as a competent rule drafter might be expected to do. In other words, the responses shed no real light on their motivations (to say nothing of the 61% who did not say they use *Auer* at all). Walker himself concludes that the impact of *Seminole Rock/Auer* on those who answered affirmatively is "a bit of a puzzle." *Id.* at 1065. Notably, the only respondent whom Walker quotes as offering an additional comment expressly denied being influenced by the purported incentive to write vague regulations. *Id.* ("Re *Seminole Rock/Auer*, I personally would

Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297, 308 (2017) ("[W]e are unaware of, and no one has pointed to, any regulation in American history that, because of *Auer*, was designed vaguely and broadly. There is no reason to believe that the magnitude of the posited incentive is substantial."); Ronald M. Levin, *Auer and the Incentives Issue*, 36 Yale J. On Reg.: Notice & Comment (Sept. 19, 2016), http://yalejreg.com/nc/ *Auer*-and-the-incentives-issue-by-ronald-m-levin/ ("It is disconcerting that the challenge to *Auer* deference has picked up so much steam with so little factual grounding for one of its key premises."). Indeed, in the very cases in which Members of this Court have questioned *Auer* on this basis, the regulations at issue did not exemplify the kind of discretion-enhancing vagueness and breadth that *Auer* deference allegedly produces. See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211–1213 (2015) (Scalia, J., concurring); *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 616–21 (2013) (Scalia, J., concurring in part and dissenting in part); *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67–68 (2011) (Scalia, J., concurring).

Even more to the point, the most ambitious effort to date to test the hypothesis did not find that *Auer* deference had produced the kinds of "vague and open-ended" regulations that critics posit. See Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effect on Agency Rules*, 119 Colum. L. Rev. 85, 105 n.88 (2019). Walters undertook an empirical analysis of economically significant rules promulgated during the period 1982–2016 to test what he

---

attempt to avoid issuing ambiguous regulations that we would then have to interpret.")

called the "self-delegation" thesis—namely, that *Auer* deference incentivizes agencies to promulgate broad and vague regulations. *Id.* at 90, 119. Applying multiple well-recognized linguistic measures of clarity and definiteness to a dataset including over 1200 rules, Walters concluded that "[t]he most notable statistically significant finding from all of the analyses is the complete opposite of what the self-delegation thesis would have predicted—clarity over legal duty actually increased following *Auer*." *Id.* at 138–39. More variation existed for major rulemaking agencies (those with more than twenty rules in the dataset), with some such agencies increasing "the clarity of their rule texts over time" while others "show[ed] more volatile patterns, with major upticks and downticks in vagueness both before and after *Auer*." *Id.* at 132. Yet even here Walters did not find the consistent trend towards vagueness that the self-delegation thesis would predict. Noting that his findings "remain robust even after looking at the data from a number of angles," he concluded that "[t]hese results, if nothing else, shift the burden in the debate over *Auer*." *Id.* at 142.

It is not difficult to understand why *Auer* fails to produce the results that its critics fear. Even if *Auer*, considered in isolation, might in theory create an incentive for agencies to promulgate broad and vague regulations, the incentives to produce regulations that are clear and specific are stronger and more numerous. Persons and entities subject to regulatory regimes seek clarity so that they can conform their conduct to law, and routinely press agencies to produce such clarity in their formal comments and ex parte communications during rulemaking proceedings. By the same token, regulators want their regulations to be effective,

and clarity promotes compliance and effective enforcement. See Sunstein & Vermeule, *supra*, at 309.

The existence of "hard look" review of agency rulemaking under the APA's "arbitrary and capricious" standard also provides a powerful spur toward clarity and specificity. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). It is well established that agencies conduct rulemakings with eventual judicial review firmly in mind. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1419–20 (1992); Walters, *supra*, at 157–64.[8]

Indeed, a study by the Administrative Conference of the United States specifically found that agency officials favor clarity and specificity in agency rules as means of reducing adverse judicial rulings under the hard look doctrine. See Blake Emerson & Cheryl Blake, Admin Conference of the U.S., *Plain Language in Regulatory Drafting: Final Report*, 14–19 (Dec. 8, 2017), https://www.acus.gov/sites/default/files/documents/Plain%20Regulatory%20Drafting_Final%20Report.pdf. The study quotes agency officials explaining that agencies can "defend regulations better when we've developed the record and made the regulation clear and understandable to the public," and that if "regulations just aren't understandable, or they can be misconstrued you are a lot more vulnerable legally." *Id.* at 14–15. See also Walters, *supra*, at 163.

---

[8] See also Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 Law & Contemporary Problems 1, 26 (1998). (To reduce the risk of defeat in court, agency lawyers typically seek "to achieve clarity in the wording of the rule" at issue).

If all of that were not enough, "for agencies, ambiguities are a threat at least as much as they are an opportunity." Sunstein & Vermeule, *supra* at 309. In promulgating regulations, agency officials know that they will not always be in a position to control how those provisions will be interpreted and enforced over time. Future administrations may approach enforcement of a particular regulatory regime from very different policy or value perspectives. A precise and clear regulation limits the interpretive and enforcement discretion of future administrations—requiring the often laborious process of renewed notice and comment rulemaking to implement a change of direction. In contrast, a broad and vague regulation confers on future administrations the power to interpret and enforce that regulation in a manner that its promulgators would find ineffective or even harmful. *Id.*

Finally, the present case is a particular inapt one in which to advance the argument that agencies exploit *Auer* deference to aggrandize their power. It is implausible to imagine that the Veterans Administration used the word "relevant" in § 3.156(c) in order to leave latitude for a less circumscribed decision later. Nobody has suggested as much. More likely, it never occurred to anyone that the regulation would be read as Petitioner reads it. Moreover, the VA would have known that, if interpretation of its regulation were to prove necessary, that job would be done in review by the CAVC, which Congress created for the very purpose of affording an independent review within the administrative process. The CAVC, an Article I court, is "a court of record" that is independent of the Department of Veterans Affairs and its decisions are not subject to the Secretary's review. See 38 U.S.C. §§ 7251–52; see also 38 U.S.C. § 7281(h) ("The Court shall not

be considered to be an agency within the meaning of section 3132(a)(1) of title 5."). Moreover, the CAVC reached its interpretation in this case in the absence of an instruction on point from the Secretary or an opinion by the Department's chief legal officer[9] and did not suggest that its affirmance of the BVA's reading of "relevant" rested on deference.

3. No inconsistency with the APA's rulemaking provisions and the values they further. At its core, Petitioner's argument appears to be that notice and comment rulemaking is the only legitimate means of significant agency policy-making, and that agencies should therefore be denied the discretion to make any material policy choices outside of that process. But that is simply incorrect. It has been clear since even before enactment of the APA that, unless governing statutes or regulations provide otherwise, agencies may announce new principles in adjudicatory proceedings rather than through generalized rulemaking. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). *Chenery* explained why this doctrine is essential:

> In performing its important functions . . . an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

---

[9] See 38 U.S.C. § 7104(c) ("The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.")

> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.

332 U.S. at 202–03.

Courts have been vigilant in guarding against unfair retroactivity or defeat of justified reliance interests, and this may preclude application of newly announced principles to the case at hand.[10] Within the context of those safeguards, however, policymaking by adjudication is commonplace. Indeed, Petitioner's argument is anachronistic. In the early years of the APA, adjudication was the norm and substantive rulemaking was exceptional. See Reuel E. Schiller, *Rule-*

---

[10] See, e.g., *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–55 (2012) (holding that the FCC's failure to provide notice of its statutory interpretation "fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited" and prevented holding regulated parties liable for violating statutory provision) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008); *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102–03 (D.C. Cir. 2001) (upholding articulation of new policy but not its application where "retroactive application" of the new policy would work a "manifest injustice").

making's Promise: Administrative Law and Legal Culture in the 1960s and 1970s, 53 Admin. L. Rev. 1139, 1145–47 (2001).

For similar reasons, there is no merit to Petitioner's argument that *Auer* deference "injects intolerable unpredictability into agency action." Pet. Br. at 36. This argument essentially repeats, in a different guise, Petitioner's unwarranted assumption that the legal system misfires whenever policies are made by a means other than legislative rulemaking. As just explained, policymaking through adjudication is often a necessary alternative to rulemaking; and well-established case law safeguards protect justified reliance interests when an unforeseen interpretation might lead to unfairness. Indeed, a wholesale shift from agency to court of the responsibility to decide upon the "best" interpretation of ambiguous regulations is not likely to confine agency discretion in the manner Petitioner posits. Rather, such a shift might have the perverse effect of giving agencies less incentive to write rules in the first place and to instead make policy through case-by-case adjudications—as they are entitled to do, and as was the norm in the first decades of administrative practice. See Aaron L. Nielson, *Beyond Seminole Rock*, 105 Geo. L.J. 943, 948 (2017).

Such a shift could also be expected to produce instability and disuniformity in the wake of judicial review of agency interpretations. Given the difficulty of applying often technical regulatory language in diverse and complicated factual settings that may or may not have been anticipated by the drafters of the regulation, it stands to reason that courts will come to different and conflicting judgments about how a regulation is "best" or "most fairly" read. See Peter L. Strauss, *One*

Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1121–22 (1987). Such conflicting rulings would raise the cost of compliance for regulated entities and could undermine settled expectations in regulated industries. By reducing both the incentive to prefer adjudication over rulemaking and the prevalence of conflicting judicial interpretations of regulations, *Auer* promotes clarity, fair notice and stability over time.

4. No inadequacy of procedure. Relatedly, there is no merit to Petitioner's contention that the principles of *Mead* foreclose *Auer* deference because agency interpretations of their own regulations lack procedural safeguards. This Court has not limited *Auer* to formal proceedings. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) ("*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief") (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 207–08 (2011)). And *Mead* itself made clear that interpretive deference is sometimes appropriate "even when no such administrative formality was required and none was afforded." *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001). Moreover, the APA contains exemptions from notice-and-comment requirements for certain classes of rules that would likely elicit *Chevron* deference. *See* 5 U.S.C. §§ 553(a)(1)–(2); 553(b)(B); *City of New York v. Permanent Mission of India to UN*, 618 F.3d 172 (2d Cir. 2010) (State Department rule qualified for foreign affairs exemption and also for *Chevron* deference); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225 (D.C.

Cir. 1994) (Medicare rule qualified for good cause exemption and *Chevron* deference).

Even if the principles of *Mead* might have some relevance to the question of deference to interpretations of regulations generally, they pose no difficulty here. The decisions by BVA and CAVC were rendered through use of the very procedures that Congress designed for resolving cases of this sort. Thus, in *Mead* terms, Congress "would expect" their decisions to receive substantial deference. Cf. *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1246–49 (9th Cir. 2013) (allowing *Chevron* deference for HHS approvals of state Medicaid plans because these decisions, although informal, were exercises of expressly conferred legislative authority); *Pharmaceutical Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 819 (D.C. Cir. 2004) (same).

The veterans' adjudication process involves significant adjudicative procedures, including the filing of briefs and written opinions. According to one observer, after the Veterans Judicial Review Act was adopted, the CAVC "quickly developed one of the most demanding rubrics of appellate review known in the American legal system. . . . [The CAVC] will ordinarily not reach the merits of an issue . . . unless the BVA explicitly has made all the relevant findings of fact and explained why any unfavorable findings were resolved against the veteran." James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. Ann. Surv. Am. L. 251, 273–74 (2010). "Therefore, '[i]n practice, [the Act's reasons requirement] means that . . . the [BVA] decision must affirmatively

discuss all the relevant evidence and law, and articulate a valid and comprehensive basis for denying benefits.' This stern standard . . . has added a substantial layer of formality to a once highly informal system." *Id.* at 274. In short, the agency's interpretation here fits well within the kind "fair and considered judgment" that the *Christopher* Court required for *Auer* deference to be warranted. See 567 U.S. at 155.

If the Court wishes to consider holding that *Auer* deference should be withheld in other contexts in which a more informal decision is reached, it should await a case that presents such a situation.

II. *Auer* Deference Raises No Issue Under the Constitution or the Administrative Procedure Act.

A. *Auer* deference is fully consistent with the Constitution's separation of powers.

Judicial deference to agency interpretations of ambiguous regulatory provisions they administer is fully consistent with the Constitution's separation of powers. Such deference is in no sense an intrusion on the authority of Article III courts to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Nor does it unconstitutionally aggrandize executive power by impermissibly combining law-making and law-applying responsibilities.

Auer deference neither "transfer[s] . . . judicial power to the Executive Branch," nor "amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches," as some critics allege. *Perez*

v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in the judgment). Far from it. *Auer* deference does not "amount[] to a transfer of the judge's exercise of interpretive judgment to the agency," *id.* at 1219–20, because, as discussed above, it applies only to reasoned interpretations that are not "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. This standard leaves room for the courts to impose significant control over agencies' interpretations of regulations, and they have done so, incrementally identifying contexts in which *Auer* deference is inappropriate. Moreover, to hold that courts cede the judicial power when they defer to reasonable agency interpretations that are consistent with governing statutes and regulations would invalidate all forms of deference to agency interpretations—not simply *Auer*, but also *Chevron* and even *Skidmore* deference.

Similarly, *Auer* deference is perfectly compatible with separation of powers principles as traditionally understood. The field of administrative law has worked out a variety of political and judicial oversight mechanisms to maintain a balance of power among the branches of government. "[T]he separation of powers is fully satisfied so long as the principal institutions set out in the Constitution—Congress, president, and judiciary—exercising their prescribed functions, devise and approve the scheme of agency authority that combines rulemaking and rule-interpreting power in the agency's hands." Sunstein & Vermeule, *supra* at 311; see also Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 580 (1984) ("What we have, then, are three named repositories of authorizing power and control, and an infinity of institutions

to which parts of the authority of each may be lent."). When an agency action is questioned as possibly erroneously interpreting a regulation, all of those mechanisms apply in the same way as they usually do in the case of other administrative actions. Any agency interpretation that would be a candidate for *Auer* deference must relate to a matter that is within the substantive authority that Congress delegated to the agency.[11] And it is for the courts ultimately to decide whether an agency acts in a manner that is consistent with that authority. Just as *Chevron* provides the appropriate framework for answering that question when an agency has enacted a regulation implementing an ambiguous statutory provision, *Auer* provides the appropriate framework for answering that question when interpreting a regulation.

For these same basic reasons, *Auer* deference does not violate any separation-of-powers principle that "the power to write a law and the power to interpret it cannot rest in the same hands." See *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part). The Constitution has never been understood to

---

[11] Some amici insist that an agency should have no claim to *Auer* deference unless Congress specifically empowered it to adopt authoritative interpretations of its regulations. *See, e.g.*, Merrill Br. at 14–16. Yet in many cases, probably including this one, the agency would have had clear statutory authority to reach the same substantive result, such as through an adjudication, even if it had never issued the regulation in question in the first place. It is difficult to see why, under such circumstances, the additional showing sought by amici should be needed in order to validate the administrative action's congressional bona fides.

require such a stark and complete division of functions. To the contrary, this Court has repeatedly stated that the combination of functions in an agency is not itself unconstitutional. See *Withrow v. Larkin*, 421 U.S. 35, 54–55 (1975); *Marcello v. Bonds*, 349 U.S. 302, 311 (1955); *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). For example, agencies routinely enforce regulations that they have promulgated and routinely adjudicate violations of those regulations in administrative proceedings. If the separation of powers forbids agencies from both promulgating rules and deciding what they mean, then these well-established and core functions of public administration are illegitimate—they would violate the supposed prohibition on combining law-making and law-interpreting functions far more starkly than does *Auer* deference. That cannot be correct.

At bottom, what the Petitioner and his supporting *amici* seek is not the application of any familiar, accepted separation-of-powers principle but the creation of an entirely new and unrooted limit on the scope of agency authority. But, as demonstrated above, the supposed problem that motivates calls for this new limitation—the risk that agencies will "write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later," *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring)—is not a problem that exists in the real world. It therefore cannot justify overruling *Auer*.

B. *Auer* deference is fully consistent with Section 706 of the APA.

Auer deference does not violate Section 706 of the APA. Section 706 provides that "the reviewing court

shall decide all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action," 5 U.S.C. § 706, but its language does not specify the manner in which courts are to "decide" or "determine" these matters. Courts are free to rely on common canons of construction, of which *Auer* is one, in doing so.

The lack of constraint that the APA imposes in this regard is borne out by the Attorney General's Manual on the APA. The Manual says of section 10(e) (now § 706): "This restates the present law as to the scope of judicial review." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 107–08 (1947).[12] In reaching this conclusion, the Manual relies on a passage in the Comparative Committee Print published by the Senate Judiciary Committee in 1945, which had elaborated:

> A restatement of the scope of review, as set forth in subsection (e), is obviously necessary lest the proposed statute be taken as limiting or unduly expanding judicial review. . . . It is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review.

---

[12] The Manual has been "given some deference by this Court because of the role played by the Department of Justice in drafting the legislation," *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978).

See *Administrative Procedure Act: Legislative History*, S. Doc. No. 79-248, at 39 (1946) (reprinting the Committee Print).

The term "restatement" implies a congressional acknowledgement that the courts are the engines of doctrinal change in this area. The role of section 10(e) of the APA, therefore, was merely to summarize judicial doctrine without circumscribing future developments. Indeed, in the years following the enactment of the APA, the Court did not understand the provision as constraining its elaboration of deference principles. "From 1946 to 1960, the Court never indicated that section 706 rejected the idea that courts might defer to agency interpretations of law. On the contrary, several decisions explicitly embraced that idea." Cass R. Sunstein, *Chevron as Law*, Geo L.J. (forthcoming), at 36, https://ssrn.com/abstract=3225880. And it bears remembering that *Seminole Rock*, the direct precursor of *Auer*, was decided in 1944, while the APA was being drafted. If the drafters had intended to overrule so recent a decision of the Supreme Court, they surely would have made that intention known, yet there is no indication that they did.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

RONALD M. LEVIN
William R. Orthwein Distinguished Professor of Law
WASHINGTON UNIVERSITY SCHOOL OF LAW
Campus Box 1120
St. Louis, MO 63130

GILLIAN E. METZGER
Stanley H. Fuld Professor of Law
CENTER FOR CONSTITUTIONAL GOVERNANCE
COLUMBIA LAW SCHOOL
435 W. 116th Street
New York, NY 10027

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004
(202) 220-1100
Donald.Verrilli@mto.com

March 4, 2019

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

HAROLD C. BECKER
MATTHEW J. GINSBURG
(Counsel of Record)
SHELBY CALAMBOKIDIS
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397
mginsburg@aflcio.org

Mosaic - (301) 927-3800 - Cheverly, MD

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES:

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

Blubaugh v. McDonald,
773 F.3d 1310 (Fed. Cir. 2014) 22, 23

Bowen v. Georgetown University Hospital,
488 U.S. 204 (1988) 14

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962) 14

Christensen v. Harris County,
529 U.S. 576 (2000) 19

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 19, 20

Edwards' Lessee v. Darby,
25 U.S. (12 Wheat) 206 (1827) 8

Ehlert v. United States,
402 U.S. 99 (1971) 14

Epilepsy Foundation of Northeast Ohio v. NLRB,
268 F.3d 1095 (D.C. Cir. 2001) 13

Ford Motor Credit Co. v. Milhollin,
444 U.S. 555 (1980) 6

Gonzales v. Oregon,
546 U.S. 243 (2006) 19

TABLE OF AUTHORITIES—Continued

Page

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 13

INS v. Stanisic,
395 U.S. 62 (1969) 14

Kisor v. Shulkin,
869 F.3d 1360 (Fed. Cir. 2017) 2, 3, 4, 20, 21, 22, 23

Long Island Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 4

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S. 144 (1991) 6, 13

NLRB v. Hearst Publications, Inc.,
322 U.S. 111 (1944) 9

North Haven Board of Education v. Bell,
456 U.S. 512 (1982) 14

Northern Indiana Public Service Co. v. Porter County Chapter of Izaak Walton League, Inc.,
423 U.S. 12 (1975) 14

Norwegian Nitrogen Products Co. v. United States,
288 U.S. 294 (1933) 4, 8, 9, 16

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015) 15

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 13

TABLE OF AUTHORITIES—Continued

	Page
SEC v. Chenery Corp., 318 U.S. 80 (1943)	6, 9
SEC v. Chenery Corp., 332 U.S. 194 (1947)	4, 9, 12, 13, 16, 18
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	17
Surgett v. Lapice, 49 U.S. (8 How.) 48 (1850)	8
Udall v. Tallman, 380 U.S. 1 (1965)	14
United States v. Larionoff, 431 U.S. 864 (1977)	14, 15
United States v. Macdaniel, 32 U.S. (7 Pet.) 1 (1833)	8
Watt v. *Alaska*, 451 U.S. 259 (1981)	13, 14
STATUTES AND REGULATIONS:	
29 U.S.C. § 213(a)(1)	16
38 U.S.C. § 7292	3
38 U.S.C. § 7292(c)	20
38 U.S.C. § 7292(d)(1)(A)	20
38 C.F.R. § 3.156(a)	22
38 C.F.R. § 3.156(c)	2, 22, 23
38 C.F.R. § 3.156(c)(1)	2, 20, 21, 24
38 C.F.R. § 3.156(c)(3)	3
38 C.F.R. § 3.156(c)(4)	22, 23

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS:

R. Pierce, Administrative Law Treatise (5th ed. 2010) 13

Brief for the United States as Amicus Curiae, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897) 17, 18

Brief for the United States as Amicus Curiae Supporting Affirmance, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897) 17

Respondents Brief on the Merits, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897) 17

New and Material Evidence, 70 Fed. Reg. 35,388 (proposed June 20, 2005) 22, 23

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women.[1]

The question presented in this case is "[w]hether the Court should overrule *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] and [*Bowles v.*] *Seminole Rock* [*& Sand Co.*, 325 U.S. 410 (1945)]." The AFL-CIO has a strong interest in the proper resolution of this question because members of AFL-CIO-affiliated unions depend on a daily basis on the effective enforcement of workplace-related regulations by numerous federal agencies, including the Occupational Health and Safety Administration, the Mine Safety and Health Administration, and the Wage and Hour Division of the United States Department of Labor.

STATEMENT

Petitioner James L. Kisor served on active duty in the Marine Corps from 1962 to 1966, including with the 2nd Battalion of the 7th Marines in the Vietnam War, during which time he saw combat in "Operation

---

[1] Counsel for the petitioner and counsel for the respondent have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

Harvest Moon." *Kisor v. Shulkin*, 869 F.3d 1360, 1361 & n.1, 1362 (Fed. Cir. 2017). In December 1982, Kisor filed a claim for disability compensation benefits for post-traumatic stress disorder (PTSD) with the Department of Veterans Affairs (VA) Regional Office in Portland, Oregon. *Id.* at 1361. The Regional Office denied Kisor's benefits claim in May 1983 on the basis of a VA examiner's determination that he "suffered from 'a personality disorder as opposed to PTSD.'" *Ibid.* (quoting Addendum to PTSD review (J.A. 13)).

In June 2006, Kisor submitted a request to reopen his previously-denied claim. *Id.* at 1362. While his request was pending, Kisor submitted additional service department records concerning his participation in Operation Harvest Moon, records that the VA could have—but did not—obtain and review as part of its consideration of Kisor's original claim for benefits. *Id.* at 1362, 1364 n.5.

This time the Regional Office concluded that Kisor did have PTSD based on his service in Vietnam. *Id.* at 1362. Benefits were made effective June 5, 2006, the date he filed his request to reopen. *Ibid.*

Kisor appealed the Regional Office's decision, seeking an effective date based on his original benefits claim. *Id.* at 1362-63. As relevant here, the Board of Veterans Appeals analyzed this request under 38 C.F.R. § 3.156(c), which states that the VA will reconsider a prior claim "'if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim.'" *Id.* at 1363 (quoting 38 C.F.R. § 3.156(c)(1)). That same regulation states that "[a]n award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose

or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(3).

The Board denied Kisor's request for reconsideration on the basis that the service department records submitted by Kisor in 2006 were not "'relevant'" within the meaning of the regulation. *Kisor*, 869 F.3d at 1364 (quoting Board decision). The Board stated that "'relevant evidence . . . would suggest or better yet establish that the Veteran has PTSD as a current disability.'" *Ibid.* (quoting Board decision). Kisor's records "were not 'outcome determinative' and 'not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat with the enemy during service.'" *Ibid.* (quoting Board decision).

Kisor appealed the Board's decision to the United States Court of Appeals for Veterans Claims. *Ibid.* The Veterans Court denied Kisor's appeal in a single-member, non-precedential decision. *Ibid.* *See* App. to Cert. Pet. 23a-25a (Veterans Court decision).

Kisor then appealed to the Federal Circuit, which has jurisdiction over decisions of the Veterans Court. *See* 38 U.S.C. § 7292. After considering both parties' arguments concerning the meaning of the dispositive regulation, the court of appeals ultimately concluded that "neither party's position strikes us as unreasonable." *Kisor*, 869 F.3d at 1366-68. On that basis, the court deferred to the Board's proffered interpretation of the regulation,[2] explaining that it did not find the Board's interpretation to be "'plainly erroneous or in-

---

[2] "Because the Board is part of the VA," the court held that "the Board's interpretation of the regulation [was] deemed to be the agency's interpretation." *Id.* at 1367 n.10.

consistent' with the VA's regulatory framework." *Id.* at 1368 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007), quoting, in turn, *Seminole Rock*, 325 U.S. at 414). *See also id.* at 1367 (quoting *Auer*, 519 U.S. at 461, for same).

Kisor filed a petition for a writ of certiorari. The Court granted the writ limited to the following question: "Whether the Court should overrule *Auer* and *Seminole Rock*."

SUMMARY OF ARGUMENT

Congress frequently delegates to administrative agencies authority to both promulgate rules interpreting a statute and to apply those rules in particular cases. The judiciary's role, in the first instance, is to ensure that the agency's rules represent a reasonable interpretation of the statute and, with regard to the agency's application of its rules in any subsequent case, to determine whether the agency's interpretation of its rules is reasonable.

When an agency exercises these congressionally-delegated powers through adjudication, judicial review is, without question, deferential. *See generally SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947). That is particularly the case when an agency, through its decisions, provides an initial, contemporaneous construction of the statute. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

It can hardly be doubted that similar deference is due where an agency engages in rulemaking and initially explains how the rule applies in common or otherwise foreseeable situations—*e.g.*, in the preamble to a regulation or in published agency guidance—or where an agency shows a record of consistently ap-

plying the same interpretation of its regulation in adjudications.

In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court followed this approach, balancing the need for judicial oversight with appropriate deference to the agency's congressionally-delegated authority to engage in rulemaking and to apply its reasonable interpretations of those regulations in the course of enforcing them in specific cases.

Auer v. Robbins, 519 U.S. 452 (1997), purported to do no more than apply the approach to deference illustrated by *Seminole Rock*. However, *Auer*—which deferred to an interpretation that the agency acknowledged it had announced for the first time in its *amicus* brief to this Court—has come to stand for the indefensible proposition that an agency's interpretation of its regulations is virtually unreviewable.

This Court should reaffirm the carefully-bounded framework for judicial review of an agency's interpretation of its own regulations followed in *Seminole Rock*, while disavowing the strong form of deference *Auer* has come to represent.

Because the court of appeals in this case erred by extending deference to the VA's interpretation of its regulation where that interpretation had no basis in the text of the regulation, let alone in the agency's prior decisions or guidance, this Court should reverse and remand this case for further proceedings.

ARGUMENT

Since its earliest decisions, this Court has recognized that an agency's consistent construction and application of its own rule can provide practical meaning to the text of the rule and, to that extent, be entitled

to deference. At the same time, this Court has established limits on when such judicial deference is warranted, thus maintaining the judiciary's proper role in making the ultimate determination of whether an agency's interpretation of its rule is correct.

Petitioner contends that extending deference in this manner allows the agency to informally "amend a rule that was promulgated through notice-and-comment procedures." Pet. Br. 36. "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policy-making prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991). An interpretation that is consistent with the agency's past practice and adds nothing that could not have been included in the regulation in the first instance is, therefore, no "amend[ment of] a rule." Pet. Br. 36.

Where Congress has delegated to the agency "the power authoritatively to interpret its own regulations," *Martin*, 499 U.S. at 151, "judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme," *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). "Thus, while not abdicating their ultimate judicial responsibility to determine the law, *cf.* generally *SEC* v. *Chenery Corp.*, 318 U. S. 80, 92-94 (1943), judges ought to refrain from substituting their own interstitial lawmaking for that of the [agency]." *Ford Motor Credit*, 444 U.S. at 568.

This Court's decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), fully comports with this approach, exhibiting a practical and carefully-

bounded framework for determining when an agency's interpretation of its own regulation is entitled to deference that appropriately balances respect for the agency's congressionally-delegated authority to interpret its own regulations with the need for judicial oversight. On the approach followed by *Seminole Rock*, deference is appropriate when the agency has interpreted an ambiguous regulation consistently over time and thus provided notice to regulated parties of the regulation's meaning.

While the Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), purported to do no more than apply *Seminole Rock*, *Auer* has come to stand for the indefensible proposition that an agency's interpretation of its regulations is virtually unreviewable. The Court should reaffirm the framework set forth in *Seminole Rock*, while disavowing the strong form of deference *Auer* has come to represent.

In this case, the court of appeals erred by extending deference to the VA's interpretation of the pertinent regulation. In *Seminole Rock* terms, deference was not appropriate because the VA's interpretation had no basis in the agency's prior decisions or guidance and because regulated parties had no way of knowing, prior to this litigation, that the VA would interpret the regulation in the constricted manner it has advanced here.

1. *Seminole Rock* stands for the proposition that, in a case that "involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt." 325 U.S. at 413-14. Where a regulation has been given a "consistent administrative interpretation" by the agency, that consistent interpretation should be afforded "con-

trolling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414, 418.

The roots of *Seminole Rock* run deep. As this Court long ago explained: "[O]f necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits." *United States v. Macdaniel*, 32 U.S. (7 Pet.) 1, 15 (1833). "Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions." *Ibid.* Deference is especially appropriate for a "construction . . . adopted by the departments . . . soon after the act . . . went into operation." *Surgett v. Lapice*, 49 U.S. (8 How.) 48, 68 (1850). In such a circumstance, this Court has stated, "we should feel ourselves restrained, unless the error of construction was plainly manifest, from disturbing the practice." *Ibid. See also Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

This doctrine of a "kind of common law" of administrative "usage," *Macdaniel*, 32 U.S. at 15, remained robust during the early days of the modern administrative state, when much administrative policy making was conducted through adjudication. In *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), a tariff case, this Court explained:

> "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has peculiar

> weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Id.* at 315 (citations omitted).

"[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited"—*viz.* "the [agency]'s determination . . . is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *NLRB v. Hearst Publ'ns*, 322 U.S. 111, 131 (1944). *See also id.* at 130-31 (explaining that "the judgement of those whose special duty is to administer the questioned statute" is entitled to "appropriate weight" (citing *Norwegian Nitrogen*, *supra*)). It matters not whether "the reviewing court might have made a different determination were it empowered to do so." *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 94 (1943). The Court will uphold an agency decision so long as "the [agency] has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience," *i.e.*, "has made . . . an informed, expert judgment on the problem." *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 207 (1947).

It was against this doctrinal background that *Seminole Rock* was decided. Because that case so aptly illustrates the traditional approach to judicial review of an agency's interpretation of its own regulations, it is worth describing in detail.

Seminole Rock involved the Administrator of the Office of Price Administration's interpretation of Maximum Price Regulation No. 188, promulgated pursuant to the Emergency Price Control Act of 1942. 325

U.S. at 411. "The core of the regulation was the requirement that each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942." *Id.* at 413. Seminole Rock & Sand Company entered into a contract in October 1941 to provide crushed stone to a customer for 60 cents per ton, but did not deliver the stone until March 1942. *Id.* at 412. When Seminole Rock later agreed to sell stone to additional customers at higher rates, the Administrator brought an action to enjoin the sales on the ground that they exceeded the 60 cents per ton maximum established by operation of the Maximum Price Regulation, a conclusion Seminole disputed. *Id.* at 412-13.

The regulation stated that the "'Highest price charged during March, 1942' means":

> "(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942; or
>
> (ii) If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or
>
> (iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers . . ." *Id.* at 414-15 (quoting Maximum Price Regulation No. 188, § 1499.163(a)(2)).

The dispute, as described by the Court, "centers about the meaning and applicability of rule (i)." *Id.* at 415. "The Administrator claims that the rule is satis-

fied and therefore is controlling whenever there has been an actual delivery of articles in the month of March, 1942, such as occurred when respondent delivered the crushed rock . . . at the 60-cent rate." *Ibid.* "[Seminole Rock], on the other hand, argues that there must be both a charge and a delivery during March, 1942, in order to fix the ceiling price according to rule (i)." *Ibid.*

The Court began by noting that, "[a]s we read the regulation, . . . rule (i) clearly applies to the facts of this case." *Ibid.* "Whatever may be the variety of meanings, . . . rule (i) adopts the highest price which the seller 'charged . . . for delivery' of an article during March, 1942." *Id.* at 415-16 (second alteration in *Seminole Rock*) (quoting Maximum Price Regulation No. 188, § 1499.163(a)(2)). On the plain language of the regulation, then, "[t]he essential element bringing the rule into operation is thus the fact of delivery during March." *Id.* at 416.

The Court then noted that this interpretation was "further borne out by" the regulatory scheme taken as a whole. *Ibid.* "[R]ule (ii) becomes applicable only where 'the seller made no such delivery during March, 1942,' as contemplated by rule (i)." *Ibid.* (quoting Maximum Price Regulation No. 188, § 1499.163(a)(2)). And, a different section of the Maximum Price Regulation "defines the word 'delivered' as meaning 'received by the purchaser or by any carrier . . . for shipment to the purchaser' during March, 1942." *Ibid.* (quoting General Maximum Price Regulation, § 1499.20(d)).

Finally, the Court stated that "[a]ny doubts concerning this interpretation of rule (i) are removed by reference to the administrative construction of this method of computing the ceiling price." *Id.* at 417. "[I]n a bulletin issued by the Administrator concur-

rently with the General Maximum Price Regulation . . . , which was made available to manufacturers as well as to wholesalers and retailers, the Administrator stated []: 'The highest price charged during March 1942 means the highest price which the retailer charged for an article actually delivered during that month or, if he did not make any delivery of that article during March, then his highest offering price for delivery of that article during March." *Ibid.* (emphasis and footnote omitted). The bulletin also stated that, "It should be carefully noted that actual delivery during March, rather than the making of a sale during March, is controlling." *Ibid.* (emphasis omitted). And, the Court noted that the position set forth in the bulletin "has uniformly been taken by the Office of Price Administration in the countless explanations and interpretations given to inquirers affected by this type of maximum price determination." *Id.* at 417-18.

Seminole Rock provides a practical and carefully-bounded framework for determining when deference to an agency's interpretation of its regulation is appropriate. The question only arises "if the meaning of the words used [in the regulation] is in doubt." *Id.* at 414. Deference is then appropriate if the agency's construction of the regulation is "[]consistent with the regulation," *ibid.*, and comports either with a "consistent administrative interpretation of the [relevant] phrase," *id.* at 418 (footnote omitted), or, if the regulation is new, guidance "issued by the [agency] concurrently with the . . . [r]egulation," *id.* at 417, based on "a thorough examination of the problem, utilizing statutory standards and [the agency's] own accumulated experience," *Chenery II*, 332 U.S. at 207.

By contrast, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier in-

terpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). An important reason for this rule concerns "the adequacy of notice to regulated parties." *Martin*, 499 U.S. at 158. *Cf.* 1 R. Pierce, Administrative Law Treatise § 6.11, p. 543 (5th ed. 2010) ("In penalty cases, courts will not accord substantial deference to an agency's interpretation of an ambiguous rule in circumstances where the rule did not place the individual or firm on notice that the conduct at issue constituted a violation of a rule."). Surprise, of course, can be avoided if the agency makes a clear public announcement of its interpretation. *See, e.g.*, *Seminole Rock*, 325 U.S. at 417 (describing the agency's "What Every Retailer Should Know About the General Maximum Price Regulation" bulletin); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 384 (1969) (describing "the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area"). Or, if the agency announces its new interpretation in an adjudication or other fact-based determination, it can decide to apply that interpretation prospectively only. *See Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) ("[W]hen there is a substitution of new law for old law that was reasonably clear, the new rule may justifiably be given prospectively-only effect in order to protect the settled expectations of those who had relied on the preexisting rule." (Citation and internal quotation marks omitted)).

Another rationale for denying deference to an agency's changed interpretation of a regulation—especially if it first appears in the context of litigation—is to ensure that the agency has exercised its "informed, expert judgment on the problem," *Chenery II*, 332 U.S.

at 207, and is not simply engaged in "*post hoc* rationalizations for agency action," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). For that reason, a Court may require a more thoroughgoing explanation for a changed interpretation of a regulation than for an interpretation that simply continues longstanding policy. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

In light of the carefully-bounded approach described above, it is no surprise that, in the decades that followed, this Court regularly applied *Seminole Rock* in a wide range of settings, and without significant controversy. Notably, this Court did so both to extend deference where it was warranted, *see, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 4, 16-18 (1965) (Secretary of Interior interpretation of regulation regarding issuance of oil and gas leases on public land); *INS v. Stanisic*, 395 U.S. 62, 72 (1969) (INS interpretation of regulation concerning hearings for alien crewman); *Ehlert v. United States*, 402 U.S. 99, 105 (1971) (Selective Service interpretation of regulation concerning timing of conscientious objection claims); *N. Ind. Pub. Serv. Co. v. Porter Cty. Chapter of Izaak Walton League, Inc.*, 423 U.S. 12, 14-15 (1975) (Atomic Energy Commission interpretation of regulation concerning location of nuclear plants); *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977) (Navy's interpretation of Department of Defense regulation pertaining to reenlistment bonuses), as well as to deny deference when the *Seminole Rock* standard was not met, *see, e.g.*, *Watt*, 451 U.S. at 272-73 (new Department of Interior interpretation conflicting with prior interpretation that was issued contemporaneously with regulation not entitled to deference); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 538 n.29 (1982) (no deference for Department of Education's interpretation of its regulation where

"that interpretation has fluctuated from case to case"). The common thread in these cases, following *Seminole Rock* itself, was that deference will apply only where the pertinent regulation contains "ambiguous terms," the agency's "interpretation is not plainly inconsistent with the wording of the regulations," and, "throughout the period in which the [relevant] program was in effect, the [agency] interpreted the . . . regulations" consistently. *Larionoff*, 431 U.S. at 872-73.

2. *Auer v. Robbins*, 519 U.S. 452 (1997), displays a significantly less-bounded approach to deference to an agency's interpretation of its own regulations than *Seminole Rock*. As a result, *Auer* came to stand for the proposition that an agency's interpretation of its own regulation is virtually unreviewable. In response, some agencies sought deference for their interpretations of regulations in circumstances that would not have qualified for deference under *Seminole Rock*. This Court then cut back on *Auer*, and, in addition, some members of this Court began to question the entire enterprise of extending judicial deference to agency interpretation of regulations. *See, e.g., Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment) ("I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument."); *id.* at 1213 (Scalia, J., concurring in the judgment) ("I would . . . abandon[] *Auer* . . . ."); *id.* at 1225 (Thomas, J., concurring in the judgment) ("[T]he entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case."). *But see id.* at 1208-09 & n.4 (Sotomayor, J., opinion for the Court) (generally approving of extending deference to agency interpretations of their own regulations, while making clear that "*Auer* deference is not an inexorable command in all cases").

Auer itself is flawed, as we explain below, but not for any reason that provides a basis for overruling *Seminole Rock*. To the contrary, as we have demonstrated, the *Seminole Rock* framework constitutes a practical and bounded approach to judicial review of agency interpretation of regulations that recognizes that those "charged with the responsibility of setting [the agency's] machinery in motion," *Norwegian Nitrogen*, 288 U.S. at 315, are frequently best-positioned to provide authoritative interpretations of the regulations they enforce, while also requiring clear indicia that the agency actually "has made . . . an informed, expert judgment on the problem," *Chenery II*, 332 U.S. at 207, before judicial deference is extended. The Court should thus reaffirm the approach set forth in *Seminole Rock* and discard the strong form of deference represented by *Auer*.

Auer, which involved two private parties, concerned, *inter alia*, dueling interpretations of the Secretary of Labor's "salary-basis" test regulation implementing the Fair Labor Standards Act's exemption from overtime requirements for "bona fide executive, administrative, or professional" employees. 519 U.S. at 454-55 (quoting 29 U.S.C. § 213(a)(1)). The United States filed an *amicus* brief on behalf of the Secretary of Labor supporting the respondent employer's interpretation of the regulation. Citing *Seminole Rock* and its "plainly erroneous or inconsistent with the regulation" standard, the Court deferred to the Secretary's position, noting that the Secretary's interpretation of "[t]he critical phrase [of the regulation] comfortably bears the meaning the Secretary assigns." *Id.* at 461. The Court did not, however, reference any prior opinions or interpretations by the Secretary that supported this interpretation. Rather, the Court cited only to two dictionaries containing similar definitions of the

relevant regulatory phrase, and extolled the fact that "[t]he Secretary's approach rejects a wooden requirement" and "avoids the imposition of massive and unanticipated overtime liability." *Ibid.*

It is notable, in this regard, that neither the respondent employer nor the United States sought *Seminole Rock* deference for the Secretary of Labor's views.[3] *See* Respondents Brief on the Merits at 27-28 & n.12, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897); Brief for the United States as Amicus Curiae Supporting Affirmance at 21-24, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897). Instead, the employer sought only *Skidmore* deference for the Secretary's "body of experience and informed judgment" as expressed in the *amicus* brief. Respondents Brief on the Merits at 28 n.12 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The United States sought no deference at all for the Secretary's views. That is presumably because, as the United States explained in its brief filed at the *certiorari* stage—in which it set forth the same merits argument while urging the Court not to take the case—"the cases upon which petitioners rely [to show a circuit split] were all decided *without the benefit of a clear statement* by the Department of Labor on the correct reading of its regulations." Brief for the United States as Amicus Curiae at 14 (emphasis added). Citing *Seminole Rock*, the government then asserted that, "[a]ccordingly, *in future cases*, the courts of appeals will be guided by the Secretary's interpre-

---

[3] The employer was aware of the Secretary of Labor's position at the time it filed its merits brief because, as we explain in the text, the United States had previously filed a brief at the *certiorari* stage in which it set forth the Secretary's view on the merits. *See* Brief for the United States as Amicus Curiae at 8-11, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897).

tation in construing the applicable regulations." *Id.* at 15 (emphasis added). Yet, despite the frank acknowledgment by the United States that there was no clear prior statement of the Secretary of Labor's position on the dispositive interpretive issue, this Court summarily dismissed the petitioners' complaint that the Secretary's interpretation was not worthy of deference. *See Auer*, 519 U.S. at 462 ("There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.").

The problem, in *Seminole Rock* terms, was that there was no reliable indicia that the Secretary's interpretation as set forth in the *amicus* brief reflected the agency's fair and considered judgment. For example, there was neither evidence of a "consistent administrative interpretation" of the relevant phrase of the regulation, 325 U.S. at 418, nor any pre-litigation publication of the agency's views—akin to the Maximum Price Regulation bulletin in *Seminole Rock*—that would ensure both that regulated parties had notice of the agency's interpretation and that the view expressed by the agency in litigation was the result of "a thorough examination of the problem, utilizing statutory standards and [the agency's] own accumulated experience with [such] matters," *Chenery II*, 332 U.S. at 207. By extending "controlling weight," *Seminole Rock*, 325 U.S. at 414, to the Secretary's interpretation in this circumstance, *Auer* appeared to signal a loosening of this Court's standards for when it is appropriate to afford deference to an agency's interpretation of its own regulation.

Intentional or not, that signal was received by agencies. Their aggressive assertion of *Auer* deference in subsequent cases led to a series of decisions in which this Court imposed limits on the seemingly sweeping

assertion of the doctrine in *Auer*. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006) (*Auer* does not apply "when, instead of using its expertise and experience to formulate a regulation, [the agency] has elected merely to paraphrase the statutory language"); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154-56 (2012) (*Auer* deference inappropriate where agency "changed course after we granted certiorari in this case," because "it would result in precisely the kind of unfair surprise against which our cases have long warned" (internal quotation marks omitted)).

To be sure, the specific concerns expressed by the Court in these post-*Auer* cases are valid. Importantly, however, they are all concerns addressed by *Seminole Rock*. *Seminole Rock* makes clear that "a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt," 325 U.S. at 414, *i.e.*, "deference is warranted only when the language of the regulation is ambiguous," *Christensen*, 529 U.S. at 588. *Seminole Rock* also makes clear that "merely . . . paraphras[ing] the statutory language," "instead of [the agency] using its expertise and experience to formulate a regulation," *Gonzales*, 546 U.S. at 257, is insufficient. In order to earn deference under *Seminole Rock*, the agency must provide an affirmative "administrative construction" that provides regulated parties with clear notice of the agency's interpretation of the regulation and that construction must be "consistent." 325 U.S. at 417-18. For the same reasons, nothing in *Seminole Rock* suggests that an agency may receive deference when it "change[s] course" in its interpretation without notice to regulated parties, since such an approach "would

result in . . . unfair surprise." *Christopher*, 567 U.S. at 154-56 (internal quotation marks omitted).

There is, in sum, no reason to overrule *Seminole Rock*. Rather, this Court should reaffirm the practical and carefully-bounded *Seminole Rock* framework for judicial review of agency interpretations of regulations, while making clear the ways in which *Auer* strayed from that approach.

3. In this case, deference to the agency's interpretation of its regulation under *Seminole Rock* is clearly not appropriate. The Court should thus reverse and remand the case to the court of appeals for further consideration.

The Federal Circuit has "'exclusive jurisdiction to review and decide any challenge to the validity of any . . . regulation or any interpretation thereof'" by the Veterans Court. *Kisor*, 869 F.3d at 1365 (alteration in original) (quoting 38 U.S.C. § 7292(c)). The Court "must set aside an interpretation of a regulation that [is] . . . 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Ibid.* (quoting 38 U.S.C. § 7292(d)(1)(A)).

As the Federal Circuit explained, "[a]t the heart of this appeal is Mr. Kisor's challenge to the VA's interpretation of the term 'relevant' in 38 C.F.R. § 3.156(c)(1)." *Id.* at 1367. The court affirmed the Veterans Court's decision denying Kisor's request for reconsideration on the grounds that: (a) "[t]he Board interpreted 38 C.F.R. § 3.156(c)(1) when it ruled that Mr. Kisor's service department records were not 'relevant' under that subsection"; (b) "[b]ecause the Board is part of the VA, the Board's interpretation of the regulation is deemed to be the agency's interpretation"; and (c) therefore, "we defer to an agency's interpreta-

tion of its own regulation" pursuant to *Seminole Rock* and *Auer*. *Id.* at 1367 & n.10 (citations omitted).

The court of appeals' basis for extending deference to the Board's interpretation of the term "relevant" in § 3.156(c)(1) does not come close to meeting the criteria set forth in *Seminole Rock*. Most notably, there is nothing here to defer to except the Board's bare interpretation of that term as applied to the specific facts of this case. The Board did not cite to any decision of the Board or of the Veterans Court for its interpretation, much less to any VA guidance explaining the meaning of the regulatory term. The Secretary, in defending the Board's decision, merely "collect[ed] various competing definitions from case law, legal dictionaries, and legal treatises." *Id.* at 1368. In short, nothing in this case suggests that the VA's view is entitled to the "controlling weight" that a "consistent administrative interpretation" merits under *Seminole Rock*. 325 U.S. at 414, 418.

On the merits, Kisor raises a substantial argument that the Board's decision interpreting the regulatory term "relevant" to mean evidence that is "outcome determinative" or would "establish" a claim was arbitrary and capricious.

First, as a matter of common English usage, "'whether or not the Veteran engaged in combat with the enemy during service'" is *relevant* to whether "'a diagnosis of PTSD was . . . warranted.'" *Kisor*, 869 F.3d at 1364 (quoting Board decision). Whether the service records the VA failed to consider would have affected the VA's decision in 1983 that Kisor did not have PTSD is a fact-based question the agency should have decided after granting reconsideration, rather than stretching the meaning of the regulatory term

"relevant" to cover only those records that *necessarily* would have changed the fact-finder's decision.

Notably, the VA's amendment to, and contemporaneous explanation of, the regulation at issue in this case fully accords with this common sense understanding.

In promulgating the current version of 38 C.F.R. § 3.156(c), the VA removed a prior "new and material" requirement that had been in an earlier version of the regulation. New and Material Evidence, 70 Fed. Reg. 35,388, 35,388 (proposed June 20, 2005). *See Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014) ("In contrast to the general rule, § 3.156(c) requires the VA to reconsider a veteran's claim when relevant service department records are newly associated with the veteran's claims file, whether or not they are 'new and material' under § 3.156(a)," which "only permits claims to be reopened"). It would thus be odd to interpret the regulatory term "relevant" as setting a higher evidentiary bar than the deleted term "material"—*e.g.*, as applying only to evidence that is "outcome determinative" or would "establish" a claim, *Kisor*, 869 F.3d at 1364 (quoting Board decision)—as the Board did in this case.

Moreover, paragraph (4) of 38 C.F.R. § 3.156(c), which neither the Board, nor the Veterans Court, nor the court below considered, expressly contemplates the possibility of "[a] retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department," explaining that "[w]here such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly." 38 C.F.R. § 3.156(c)(4). The court of appeals' conclu-

sion that "Mr. Kisor's personnel records submitted in 2006 are not probative here because they do not purport to remedy the defects of his 1982 PTSD claim," *Kisor*, 869 F.3d at 1368, fails to take into account the regulation's allowance for a "retroactive evaluation of disability . . . on the basis of the new evidence from the service department." 38 C.F.R. § 3.156(c)(4).

That common sense understanding of the regulatory term "relevant" described above is buttressed by the VA's explanation in the preamble to the current regulation, which explained: "We intend that this broad description of 'service department records' will also include unit records, such as those obtained from the Center for Research of Unit Records (CRUR) that pertain to military experiences claimed by a veteran. Such evidence may be particularly valuable in connection with claims for benefits for post traumatic stress disorder." 70 Fed. Reg. at 35,388. The purpose of this rule was to "allow VA to reconsider decisions and retroactively evaluate disability in a fair manner, on the basis that a claimant should not be harmed by an administrative deficiency of the government . . . ." 70 Fed. Reg. at 35,389. *See also Blubaugh*, 773 F.3d at 1313 ("§ 3.156(c) serves to place a veteran in the position he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." (citing 70 Fed. Reg. at 35,388-89)). That is precisely Kisor's argument here—that he be allowed the "retroactive[] evaluat[ion of his] disability in a fair manner, on the basis that [he] should not be harmed by an administrative deficiency of the government." 70 Fed. Reg. at 35,389.

Finally, as a factual matter, the VA *did* rely on "official service department records that existed and had not been associated with the claims file when VA first

decided the claim," 38 C.F.R. § 3.156(c)(1), in reversing its earlier decision that Kisor did not have PTSD and in deciding that he is now entitled to benefits. The VA Regional Office's decision explained straightforwardly that: "Since VA examination shows that you have been diagnosed with posttraumatic stress disorder due to your experiences that occurred in Vietnam and your service administrative records show that you are a combat veteran (Combat Action Ribbon recipient), service connection for posttraumatic stress disorder has been established as directly related to military service." J.A. 42. Because the VA relied on "official service department records that existed and had not been associated with the claims file," 38 C.F.R. § 3.156(c)(1), in reaching the decision to reverse itself, *a fortiori*, those records were "relevant" to the new determination.

CONCLUSION

The Court should decline to overrule *Seminole Rock*. Rather, the Court should hold that the VA is not entitled to deference under *Seminole Rock* and, therefore, should reverse the court of appeals and remand this case for a decision that does not rely on *Seminole Rock* deference.

Respectfully submitted,

HAROLD C. BECKER
MATTHEW J. GINSBURG
(Counsel of Record)
SHELBY CALAMBOKIDIS
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

MARTIN S. KAUFMAN
Counsel of Record
ATLANTIC LEGAL FOUNDATION
500 Mamaroneck Avenue
Suite 320
Harrison, NY 10528
(914) 834-3322
mskaufman@atlanticlegal.org
Counsel for Amicus Curiae

January 2019

QUESTION PRESENTED

Whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

TABLE OF CONTENTS

QUESTION PRESENTED..... I
TABLE OF AUTHORITIES..... ii
INTEREST OF *AMICUS CURIAE*..... 1
INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT..... 2
ARGUMENT..... 10
I. *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* Should Be Overruled. 10
A. *Seminole Rock* and *Auer* Contravene the APA. 10
B. *Seminole Rock* And *Auer* Violate Separation of Powers Principles. ... 10
C. *Auer* Undermines the APA's Important Safeguards of the Public Interest. 13
D. *Auer* Encourages Agencies to Promulgate Ambiguous Regulations. 14
CONCLUSION..... 19

TABLE OF AUTHORITIES

Page

Cases

Auer v. Robbins, 519 U.S. 452 (1997).. . . . *passim*
Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945). . . . . *passim*
Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).. 18
Chrysler Corp. v. Brown,
441 U.S. 281 (1979). 7, 13
Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012). 8
City of Arlington, Tex. v. FCC,
133 S. Ct. 1863, 1878 (2013). 2
Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013). . . . . *passim*
Free Enterprise Fund v. *Public Co. Accounting Oversight Bd.*,
561 U.S. 477 499 (2010).. 2
Garco Constr., Inc. v. Speer,
138 S. Ct. 1052 (2018). . . . . *passim*
INS v. Chadha, 462 U.S. 919 (1983). 12
Marbury v. Madison, 5 U.S.
(1 Cranch) 137 (1803).. 12
Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015). . . . . *passim*
Rapanos v. United States, 547 U.S. 715 (2006). 16
Talk Am., Inc. v. Mich. Bell Tel. Co.,
564 U.S. 50 (2011). . . . . *passim*

TABLE OF AUTHORITIES (cont'd)

Page

Cases (cont'd)

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994). 8, 16

United States v. Morton Salt Co., 338 U.S. 632 (1950). 5, 14

United States Army Corps of Engineers v. Hawkes Co., 136 S. Ct. 1807 (2016). 2

Statutes and Regulations

Administrative Procedure Act, §55, Rule making, 5 U.S.C. § 553(c). 7, 14

Administrative Procedure Act, 5 U.S.C. §701, *et seq*.. . . . . *passim*

Administrative Procedure Act, Section 706, 5 U.S.C. §706. . . . . 5, 6, 8, 10

Consumer Products Safety Commission, Safety Standard for Bassinets and Cradles 16 C.F.R. Part 1218. 3

Federal Trade Commission, Funeral Industry Practices, 16 C.F.R. Part 453.. 3

Other Authorities

A. Alan Moghissi, *et al.*,. Innovation in Regulatory Science: Evolution of a New Scientific Discipline, 16 Technology and Innovation 155 (2014), doi:10.3727/194982414X14096821477027. . 18

TABLE OF AUTHORITIES (cont'd)

Page

Other Authorities (cont'd)
Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS 67 (Charles R. Kesler and Clinton Rossiter, eds., 2003). 12
Bryce E Esch, *et al.*, Using Best Available Science Information: Determining Best and Available, 116 Journal of Forestry 473 (September 2018) https://doi.org/10.1093/jofore/fvy037. 18
James Madison, Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003). . . 12
John F. Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96 Colum. L. Rev. 612, 674-75 (1996). 6
Natalie Lowell and Ryan P. Kelly, Evaluating Agency Use of "Best Available Science" Under The United States Endangered Species Act, 196 Biological Conservation 53 (2016), https://doi.org/10.1016/j.biocon.2016.02.003. 18
Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 397 (1986)

INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists.

Atlantic Legal's directors and advisors are familiar with the pervasive federal regulations and agency interpretation of those regulations have on businesses, professions, voluntary organizations, and individuals. They are frequently called upon in their business, professional and personal lives to gauge the impact of federal regulations on their lives and the lives of themselves, their family members, their employers, employees and colleagues. Many of Atlantic Legal's directors and

---

[1] The parties have consented to the filing of this brief, which consents have been lodged with the Court

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary or other contribution to the preparation or submission of this brief.

advisers have wide experience interpreting federal statutes and regulations.

The Foundation has an interest in ensuring that agencies do not overreach their constitutionally limited roles and regulate only in a lawful, fair and clear manner. The Foundation also has an interest in seeing that courts perform their constitutional function of limiting the power of the other branches; to do so the courts should not defer to agencies when deference is not due.

To this end, Atlantic Legal Foundation files *amicus* briefs in this Court in cases involving issues of agency overreach and judicial deference, most recently in *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

INTRODUCTION AND SUMMARY OF ARGUMENT

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Virtually all persons, natural and legal, from infant to pensioner, from individual proprietor to Fortune 50 company, from subsistence farmer to cutting nano technology entrepreneur, is untouched by federal regulation. Federal regulations affect us, literally, from "cradle to grave.:" See Consumer Products Safety Commission regulations, 16 C.F.R. Part 1218 (Safety Standard for Bassinets and Cradles) and

Federal Trade Commission regulations, 16 C.F.R. Part 453 (Funeral Industry Practices).

Regulated persons and entities are affected when an agency reinterprets its regulations in a manner that changes settled understandings without using the mechanisms and safeguards provided in the Administrative Procedure Act (APA) – principally notice-and-comment rulemaking – that provides a check on regulatory overreach by requiring public participation and the development of an administrative record that facilitates judicial scrutiny of agency action.

The principles of deference adopted in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and in *Auer* v. *Robbins*, 519 U.S. 452 (1997) (hereafter "*Auer* deference") has immense impact on individuals and corporations who are part of the "regulated community" – almost all individuals, companies, associations who are subject to ever-growing federal regulation.

"The canonical formulation of *Auer* deference is that [the Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part, dissenting in part). If a regulation has multiple plausible readings, an agency's preferred interpretaion, rather than the most logical, the one with the best linguistic meaning, or most legally relevant, will prevail. An executive branch agency will have displaced the judiciary's role in scrutinizing

executive agency claims of jurisdiction and authority. *Id.* The Court "offered no justification whatever" when it adopted this interpretive rule, *id.*, and cited no statute, constitutional provision, or precedent, and advanced no logic to support this doctrine. *Id.*

The *Auer* doctrine vests in administrative agencies expansive lawmaking authority. The continued application of *Seminole Rock* and *Auer*, gives the executive branch opportunities to usurp judicial and legislative powers that the Constitution gives to other branches. The *Auer* doctrine also is an improper delegation of authority, creates incentives for agencies to adopt vague regulations, and disrupts reasonable expectations of regulated parties. *See Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211-13 (Scalia, J., concurring in the judgment); *id.* at 1213-25 (Thomas, J., concurring in the judgment).

When agencies adopt regulations through notice-and-comment rulemaking, regulated persons have an opportunity to shape the regulatory environment and ameliorate the burdens of excessive regulation.

Auer deference does not assist a court in understanding a regulation's meaning:

fundamentally this is a legal question that courts are best equipped to answer and, additionally, it permits agencies to effect their policy preferences without affording the regulated community the protections of the "notice and comment" requirements of the APA.

The APA imposes safeguards on agencies' exercise of their lawmaking authority. Notice-and-comment rulemaking requires notice, public participation, and agency accountability.[2] *Auer* deference subverts this arrangement by allowing an agency to engage in "interpretation" that substantively changes the regulation (and thus the underlying statute), and binds the regulated public and the courts, without the APA's procedural safeguards.

Further, *Auer* deference conflicts with the plain language of Section 706 of the APA, which requires "the reviewing court [to] . . . determine the meaning or applicability of the terms of an agency action." 5 U.S.C. §706. Section 706 of the APA provides that "the reviewing court"—not the agency—"shall * * *

---

[2] Congress enacted the APA the year after *Seminole Rock* was decided. The APA's "safeguards * * * against arbitrary official encroachment on private rights" serve "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950).

determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. An "agency action," in turn, "includes the whole or a part of an agency rule." *Id.* § 551(13). Section 706 similarly allocates to Article III courts the responsibility to "decide all relevant questions of law." *Id.* Section 706 "contemplates that courts, not agencies, will authoritatively resolve ambiguities in * * * regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J.).

The *Auer* doctrine of deference to an agency's interpretation of its own regulations violates fundamental separation of powers principles. It exacerbates the problem of delegation of legislative powers to unelected executive branch officials and bureaucrats. It negates and displaces the judicial authority to interpret the laws, an authority that has been recognized since the very early days of our constitutional republic. "*Auer* is . . . a dangerous permission slip for the arrogation of power" *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620-21 (2013) (Scalia, J., concurring in part and dissenting in part) (citing *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring)). "[A] core objective of the [tripartite] constitutional structure was to ensure meaningful separation of lawmaking from the exposition of a law's meaning in particular fact situations." John F. Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96 Colum. L. Rev. 612, 674-75 (1996)); accord *Perez*, 135 S. Ct. at 1218- 1219 (Thomas, J.).

Congress established procedural and substantive safeguards in the APA to protect the public from irregular agency lawmaking, but *Seminole Rock* and *Auer* license agencies to circumvent those safeguards when they interpret their own regulations. The APA also provides the public a right to participate in the rulemaking process. See 5 U.S.C. § 553(c). An agency must implement "consideration of the relevant matter presented" to it by the public, before adopting a final rule. *Id.* "[N]otions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Auer deference "allow[s] agencies to make binding rules unhampered by notice-and-comment procedures." *Perez*, 135 S. Ct. at 1212 (Scalia, J.). It enables "the same agency that promulgated a regulation to 'change the meaning' of that regulation 'at [its] discretion,'" without the notice, public participation, and agency accountability that the APA requires. *Garco*, 138 S. Ct. 1052-1053 (2018) (Thomas, J., dissenting from the denial of certiorari).

Auer deference also encourages agencies to adopt vague regulations that they can later interpret however they see fit. This limits the regulated community's ability to conform conduct to law and "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the

notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142,158 (quoting *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

It also impedes an aggrieved party's ability to challenge a regulation. Those adversely affected by the rule may challenge it on a variety of grounds, including that the agency failed to follow the required process or that the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). But lack of a rule-making record makes it difficult, if not impossible, to prove the elements of a challenge to an "interpretation" that is, effectively, a substantial amendment of the regulation.

Auer deference also encourages agencies to adopt vague rules. "It is perfectly understandable * * * for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). Justice Scalia described the problem in *Perez*:

> Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To

> expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.

135 S. Ct. at 1212 (Scalia, J.).

Not only do vague regulations give the agency flexibility, they are an impediment to the ability of regulated entities to conform their conduct to the requirements of the law and to plan their business or personal lives.

ARGUMENT

I. *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* Should Be Overruled.

Seminole Rock and *Auer* deference should be overruled because it cannot be reconciled with the text of the APA, it undermines the APA's principal procedural safeguard, it contravenes separation of powers principles, and it cannot be justified by policy considerations.

A. *Seminole Rock* and *Auer* Contravene the APA.

The APA expressly provides that "the reviewing court shall ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The APA thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring) and makes clear that it is "the responsibility of the court to decide whether the law means what the agency says it means." *Id.*

Auer deference cannot be reconciled with the text of the APA. In *Auer*, the Court "[n]ever mention[ed] § 706's directive." *Id.* Instead, the Court simply relied on *Seminole Rock*, even though that case was decided before Congress enacted the APA. See *id.*

B. *Seminole Rock* And *Auer* Violate Separation of Powers Principles.

Seminole Rock and *Auer* deference should be overruled because it violates separation of powers principles central to the structure of our federal

government. The central critique of the *Auer* doctrine is its concentration of power to both make and interpret the law into a single branch of government. *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 68 (2011) (Scalia, J., concurring).

Auer "represents a transfer of judicial power to the Executive Branch." *Perez*, 135S. Ct. at 1217 (Thomas, J.). The Constitution vests the judicial power of the United States in the judiciary, which is to exercise "independent judgment." *Id.* But "the agency is * * *not properly constituted to exercise the judicial power under the Constitution, [so] the transfer of interpretive judgment raises serious separation-of-powers concerns." *Id.* at 1219-1220. See also *Garco Constr., Inc.*, 138 S.Ct. at 1052-1053 (Thomas, J.) ("[*Auer*] undermines'the judicial check on the political branches' by ceding the courts' authority to independently interpret and apply legal texts.").

By giving "controlling weight" to an agency's interpretation of its own ambiguous regulation, the Court has ceded the judicial function to the Executive. This violates a fundamental principle of separation of powers – that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part). Separation of the powers of government is a foundational principle of our constitutional system. Fear of concentrated power animated the structural separation of power protections in the architecture of the federal government. See James Madison,

Federalist 51, THE FEDERALIST PAPERS 318 (Charles R. Kesler and Clinton Rossiter, eds., 2003)Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra at* 67; see also *INS v. Chadha*, 462 U.S. 919, 951 (1983). *Auer* deference "undermines 'the judicial "check" on the political branches' by ceding the courts' authority to independently interpret and apply legal texts." *Garco Constr., Inc.*, 138 S. Ct. at 1052 (Thomas, J., dissenting).[3]

("[W]hen an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning . . . . It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.") (internal citations omitted). This concentration of power invades what has for over two centuries been "emphatically the province and duty of the judicial department[:] to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) ("For

---

[3] This problem is especially acute in cases such as this in which the agency's interpretation is announced in an adversarial proceeding in which the agency itself is an interested and contending party. "This "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government," *Garco Constr., Inc.*, 138 S. Ct. at 1053 (Thomas, J., dissenting), and results in "precisely the abuse[] that the Framers sought to prevent." *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring)

decades, and for no good reason, we have been giving agencies the authority to say what their rules mean.").

C. *Auer* Undermines the APA's Important Safeguards of the Public Interest.

The APA requires that agencies engage in deliberative lawmaking.

Notice-and-comment rulemaking is grounded in "notions of fairness" because it promotes "informed administrative decisionmaking" by allowing an agency to enact regulations "only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). Notice-and-comment rulemaking provides regulated entities with a vital opportunity to help shape the administrative decisions that affect them, and they have the opportunity to present evidence and make policy arguments to support their position on proposed regulations. Notice-and-comment (and the agency's response to comments) encourage such deliberative rulemaking, or at least afford the public (and a court) to ferret out arbitrary and capricious agency action.[4]

---

[4] As Justice Scalia explained, abandoning *Seminole Rock*/*Auer* deference would still leave "[t]he agency . . . free to interpret its own regulations with or without notice and comment; but *courts will decide* – with no deference to the agency – whether that interpretation is correct." *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment) (emphasis added).

Auer eviscerates rates a fundamental protection of the APA by allowing agencies to resolve ambiguity[5] by reinterpreting regulations instead of using the APA's noticeand-comment requirements to amend them. See *Perez*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) ("By giving [regulations] *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, givingthem deference allows the agency to control the extent of its notice-and-comment-free domain.").

The requirement of notice-andcomment rulemaking (see 5 U.S.C. § 553) is among the APA's chief "safeguards." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950).

D. *Auer* Encourages Agencies to Promulgate Ambiguous Regulations

A second often articulated critique of the *Auer* doctrine is that it creates perverse incentives. *Auer* deference effectively exempts agencies from the APA's notice-and-comment requirements, and leaves agencies free to promulgate ambiguous regulations and later interpret them, without judicial scrutiny of the agency. *See Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting in relevant part) (internal quotation marks omitted) ("Then the power to prescribe is

---

[5] Given the plasticity of the English language, it is very easy to "find" or create ambiguity.

augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a flexibility that will enable clarification with retroactive effect."). It leaves them free "to control the extent of [their] notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). And it provides them the opportunity "[t]o expand this domain, . . . [by] writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Id.*

[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government. *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring)..

> It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

Some agencies indeed have promulgated ambiguous regulations with the purpose of expanding their jurisdiction. See, *e.g.*, *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring) (noting that the Federal Communications Commission "has repeatedly been rebuked in its attempts to expand the [Telecommunications Act of 1996] beyond its text, and has repeatedly sought new means to the same ends."). The U.S. Army Corps of Engineers (Corps) has a history of promulgating regulations expanding its jurisdiction See *Rapanos* v. *United States*, 547 U.S. 715, 725 (2006) (plurality op.).

Agency actions that proceed without notice-and-comment put the regulated community at risk. If an agency advances an interpretation of its regulations that requires the regulated community to take, or refrain from taking, an action, that interpretation has the force of law on the matter. The regulated community must either conform to the interpretation or risk an enforcement action based on alleged non-compliance.[4] As Justice Scalia explained:

> [I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

Perez, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

Auer deference also rests on faulty assumptions and reasoning. Deference to administrative agencies is premised on their presumed subject matter expertise. However, although agencies may be "better equipped than the courts" to make technically-based policy decisions, an agency "is no better equipped to read legal texts." *Garco Constr., Inc.* 138 S. Ct. at 1053 (Thomas, J.); see also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 397 (1986). The interpretation of a regulation is a legal function, requiring the ability to analyze and interpret the text of the regulation text and other pertinent material. Agencies have no greater capacity than courts – we submit they have less experience and training – to discharge this task. *Auer* deference gives the agency's interpretation the force of law even if policy considerations, rather than legal interpretation, dictated the result.

While agencies often possess technical expertise, Congress has prescribed the mechanism by which agencies can bring their expertise to bear when promulgating regulations – the iterative notice-and-comment process. The agency likely does not have a monopoly of such expertise, and Congress has provided that notice-and-comment rulemaking be used so that other persons with expertise and different perspectives can weigh in. *Auer* deference frustrates that statutory requirement.

Auer deference is especially problematic because it gives agencies greater latitude to issue binding rules than does the Court's deference doctrine under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[6] When Congress delegates authority to issue binding regulations through notice-and-comment rulemaking, deference to the agency's interpretation of a statute is dependent on its adherence to that procedure.

---

[6] There is a lively debate whether "regulatory science" is the "best available science" (see, *e.g.*, A. Alan Moghissi, *et al.*,. Innovation in Regulatory Science: Evolution of a New Scientific Discipline, 16 Technology and Innovation 155, doi:10.3727/194982414X14096821477027 (2014), Bryce E Esch, *et al.*, Using Best Available Science Information: Determining Best and Available, 116 Journal of Forestry 473 (September 2018), https://doi.org/10.1093/jofore/fvy037; Natalie Lowell and Ryan P.Kelly, Evaluating Agency Use of "Best Available Science" Under The United States Endangered Species Act, 196 Biological Conservation 53 (April 2016), https://doi.org/10.1016/j.biocon.2016.02.003.), and whether *Chevron* deference is itself doctrinally sound. But that is an issue for another day, andn is not tto be decided in this case.

CONCLUSION

The Court should grant the writ and reverse the judgment entered below.

Respectfully submitted,

Martin S. Kaufman
Atlantic Legal Foundation
500 Mamaroneck Avenue
Suite 320
Harrison, New York 10528
(914) 834-3322
mskaufman@atlanticlegal.org
Attorneys for *Amicus Curiae*
Atlantic Legal Foundation

January 31, 2019

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF PROFESSORS— DEAN RONALD A. CASS, CHRISTOPHER C. DEMUTH, SR., AND JAMES L. HUFFMAN—AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RONALD A. CASS
Counsel of Record
CASS & ASSOCIATES, PC
10560 Fox Forest Drive
Great Falls, VA 22066-1743
(703) 438-7590
roncass@cassassociates.net
Counsel for Amici Curiae

January 31, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	10
I. Deference to Agency Decisions Depends on Legal Commitment of Discretionary Authority	10
A. Both the APA and *Chevron* Make Judicial Review Standards Dependent on Statutorily-Granted Discretion	10
1. The Administrative Procedure Act Mandates Judicial Decision on Interpretation of Law Unless Review Is Precluded or Committed to Agency Discretion by Law	11
2. The *Chevron* Decision Does Not Change Scope-of-Review Requirements of the Administrative Procedure Act and Related Law	13
B. *Chevron* Deference Has Been Denied Where Indicia of Discretionary Authority Are Absent	15
II. A General Rule of Deference to Agency Interpretation of Rule Ambiguity Is Contrary to Law, Pre-*Auer* Precedent, and Constitutional Structure	17

TABLE OF CONTENTS—Continued

Page

A. Deference to Agency Rule Interpretation Is Appropriate Only for Decisions Clearly Committed to Agency Discretion by Law; It Should Not Be Predicated on Rule Ambiguity 17

1. Deference Follows Legally Authorized Discretion Both for Rules and for Specific Decisions 17

2. An Agency Action Cannot Expand the Scope of Legally Sanctioned Discretionary Authority for the Agency and Cannot Limit the Scope of Judicial Review 19

3. A Broad Rule of Deference Is Not Supported by this Court's Decision in *Seminole Rock* 20

4. *Auer*'s Deference Unlawfully Expands the Deference Previously Accorded to Agency Rule Interpretations 23

B. *Auer* Deference Risks Violation of Due Process Guarantees through Unfair Surprise in Rule Application and Strategic Behavior in Rule Design 24

C. *Auer* Deference Undermines Constitutional Separation of Powers 27

CONCLUSION 33

TABLE OF AUTHORITIES

CASES Page(s)

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

Barnhart v. Walton,
535 U.S. 212 (2002) 4, 14, 16

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Bowsher v. Synar,
478 U.S. 714 (1986) 20

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris County,
529 U.S. 576 (2000) 17

Christopher v. SmithKline Beecham Corp.,
132 S.Ct. 2156 (2012) 2, 8, 24, 25

City of Arlington v. Federal Communications Commission,
133 S.Ct. 1863 (2013) 30

Clinton v. City of New York,
524 U.S. 417 (1998) 28

Connally v. General Construction Co.,
269 U.S. 385 (1926) 25

Constance v. Secretary of Health & Human Services,
672 F.2d 990 (1st Cir. 1982),
cert. denied, 461 U.S. 905 (1983) 15-16

TABLE OF AUTHORITIES—Continued

Page(s)

Federal Communications Commission v. Fox Television Stations, Inc., 132 S.Ct. 2307 (2012) 25

Federal Communications Commission v. Fox Television Stations, Inc., 556 U.S. 502 (2009) 29, 30

Food and Drug Administration v. Brown & Williamson, 529 U.S. 120 (2000) 9, 16, 31, 32

Gray v. Powell, 314 U.S. 402 (1941) 12

Heckler v. Chaney, 470 U.S. 821 (1985) ..... *passim*

Household Credit Services, Inc. v. Pfennig, 541 U.S. 232 (2004) 4, 14, 16

Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 16

Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) 28

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007) 8, 25

King v. Burwell, 135 S.Ct. 2480 (2015) 9, 16, 31, 32

Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Loving v. United States,
517 U.S. 748 (1996) 12

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 3, 14

Martin v. Occupational Safety and Health Review Commission,
499 U.S. 144 (1991) 5, 8, 18, 25

MCI Telecommunications Corp. v. American Telephone & Telegraph Co.,
512 U.S. 218 (1994) 9, 16, 32

Mistretta v. United States,
488 U.S. 361 (1989) 29

National Broadcasting Co. v. United States,
319 U.S. 190 (1943) 12

National Cable & Telecommunications Association v. Brand X Internet Services,
545 U.S. 967 (2005) 9-10, 32

National Labor Relations Bd. v. Hearst Publications, Inc.,
322 U.S. 111 (1943) 12

Northern Pipeline Construction Co. v. Marathon Pipeline Co.,
458 U.S. 50 (1982) 28

Norwegian Nitrogen Products Co. v. United States,
288 U.S. 294 (1933) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 5, 18

Perez v. Mortgage Bankers Association,
135 S.Ct. 1199 (2015) 29, 30

Process Gas Consumers Group v. United States Department of Agriculture,
694 F.2d 778 (D.C. Cir. 1982) 15

Robertson v. Methow,
490 U.S. 332 (1989) 21

Securities & Exchange Commission v. Chenery, 332 U.S. 194 (1947) 27

Smiley v. Citibank (South Dakota), N.A.,
517 U.S. 735 (1995) 4, 13

Stern v. Marshall,
564 U.S. 462 (2011) 28

Talk America, Inc. v. Michigan Bell Tel. Co.,
564 U.S. 50 (2011) 8, 25, 26

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 8, 25

United States v. Mead Corp.,
533 U.S. 218 (2001) 16-17

Wayman v. Southard,
23 U.S. (10 Wheat.) 1 (1825) 12, 20

Webster v. Doe,
486 U.S. 592 (1988) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001) 9, 16, 32

Yakus v. United States, 321 U.S. 414 (1944) 29

CONSTITUTION

U.S. Const., art. I, § 1 28

U.S. Const., art. I, § 7 28

U.S. Const., art. III, § 1 28

U.S. Const. amend. XIV 26

STATUTES

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§701–706 ..... *passim*

5 U.S.C. § 701 ..... 10, 11

5 U.S.C. § 706 ..... *passim*

5 U.S.C. § 706(2)(A) 11

5 U.S.C. § 706(2)(C) 11

5 U.S.C. § 706(2)(1)–(3) 15

Clean Air Act Amendments of 1977

42 U.S.C. § 7607(b)(9) 13

42 U.S.C. § 7607(b)(9)(A)–(C) 15

Communications Act of 1934

47 U.S.C. § 307 12

47 U.S.C. § 309 12

TABLE OF AUTHORITIES—Continued

Page(s)

Emergency Price Control Act of 1942, Pub. L. 77-421, 56 Stat. 23 7

National Environmental Protection Act, 83 Stat. 852, 42 U.S.C. § 4231 et seq. 21

National Security Act of 1947, 50 U.S.C. § 3036(e)(1) 18

OTHER AUTHORITIES

Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908 (2017) 6, 20

Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, Notice & Comment (Sept. 12, 2016), available at http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/ [https://perma.cc/CLR4-DTWQ] 6, 21

Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035 (2007) 12, 28

Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986) 3, 15

Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531 (2018) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147 (2016) 12, 28

Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294 (2015) ..... *passim*

Ronald A. Cass, Colin S. Diver, Jack M. Beermann & Jody Freeman, Administrative Law: Cases & Materials (7th ed. 2016) 12

Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. Legal Analysis 121 (2016) 28

Michael P. Healy, *The Past, Present and Future of* Auer *Deference:* Mead, *Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 Kansas L. Rev. 633 (2014) 6-7, 21, 22

Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47 (2015) 22

Gary S. Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002) 12, 28

Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 Chi.-Kent L. Rev. 1377 (1997). 17, 31

TABLE OF AUTHORITIES—Continued

Page(s)

Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253 (1997) 17, 31

M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383 (2004) 27

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 9, 22, 26

Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992) 12

Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 Nw. L. Rev. 551 (2012) 14, 17, 31

Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833 (2001) ..... *passim*

Aaron L. Nielson, *Beyond* Seminole Rock, 105 Geo. L.J. 943 (2017) 9, 18, 27, 31

Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85 (2018) 27

Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015) ... 12, 28

TABLE OF AUTHORITIES—Continued

Page(s)

Glen O. Robinson, *Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485 (1970) 27

Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169 (1978) 27

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989) 3, 15

David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 Am. U. L. Rev. 355 (1987) 28

Matthew Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449 (2011) 19, 22, 24

Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 Colum. L. Rev. 1143 (2012) 4, 14, 17

Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297 (2017) 30

Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo. J.L. & Pub. Pol'y 103 (2018) .....*passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999 (2015) 27

IN THE

Supreme Court of the United States

No. 18-15

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF PROFESSORS— DEAN RONALD A. CASS, CHRISTOPHER C. DEMUTH, SR., AND JAMES L. HUFFMAN—AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici are teachers, scholars, and former government officials who have served in a variety of positions in the United States government, including positions

[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

in the Executive Office of the President, executive departments, independent agencies, and the judicial branch. *Amici* have been responsible for making decisions similar to that at issue in this proceeding and for reviewing agency decisions. They also, among other things, have been deeply engaged with organizations devoted to administrative law and related subjects, and have taught classes and written numerous articles and books on matters implicated in the question presented in this case. This brief reflects *amici*'s longstanding interests in the subject of administrative law and particularly standards for judicial review of administrative action.

SUMMARY OF ARGUMENT

The rule of deference articulated first in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (*Seminole Rock*) and restated in *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (*Auer*), contradicts governing law, conflicts with the rationale for deference associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), and generates serious potential problems with constitutional structure and due process guarantees. Application of the deference rule in *Auer* also differs significantly from that in *Seminole Rock*, exacerbating problems with the rule and further undermining any arguable basis for its retention. Although this Court's decision in *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166–69 (2012) (*Christopher*), limits some of the ill effects of *Auer* deference, it does not cure its essential problems.

The basic understanding for statutory grants of review authority and for the majority of this Court's decisions respecting review of administrative actions is that courts interpret law (including the statutes

that authorize administrative action and legally meaningful rules adopted in implementing the law) but defer to administrators to the extent that they are acting pursuant to a legal commitment of discretionary authority. See, e.g., Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (1989). The legal rule, in other words, is that *deference is the corollary of delegated discretion*. When laws grant agencies deference within some space to articulate the policies that, in the agency's view, best implement a statutory directive—whether the agency explains those policies in some measure in terms of their fit with particular statutory language or in terms of other rationales that by law are within the agency's purview—courts should defer to agency decisions that are within that discretionary space.

Despite disagreements on the exact nature of and terms for determining the scope of legally delegated discretion, there is broad agreement that courts have the authority and obligation "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), including the law's parameters of delegated discretion. That has been accepted doctrine for more than two centuries; it is embodied, among other places, in the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§701–706 (APA), which clearly gives courts reviewing agency actions the duty to interpret law—including agency regulations—but limits review to the extent precluded by law or committed to agency discretion by law. Courts, not agencies, are plainly empowered to determine how far that commitment of discretion extends.

This understanding of the division of authority between courts and agencies also was the predicate for *Chevron* deference. See, e.g., *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–41 (1995). It is why the opinion in *Chevron* observed that courts are "the final authority on issues of statutory construction," and are expected to use "traditional tools of statutory construction" to interpret statutory directives. *Chevron*, 467 U.S. at 843 n.9. At the same time, when a court determines that, explicitly or implicitly, a law commits a matter to agency discretion (including the exercise of policy judgment on the best mode for implementation of statutory terms), courts defer to the agency's decision.

Even though this understanding of the basic law of judicial review often is characterized as mandating deference on the *interpretation* of the governing *law*, the better way to appreciate *Chevron* deference is as judicial recognition of discretion to make decisions on *policy* matters respecting *implementation* of law within a statutorily-sanctioned range of discretionary decisions. See, e.g., Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294, 1314–15 (2015) (*Rethinking*); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 836 (2001); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 Colum. L. Rev. 1143, 1145–50 (2012). That is why deference generally does not preclude review to assure reasonableness of agency action; deference extends to agency decisions so far—but *only* so far—as the governing law (interpreted by courts) commands. See, e.g., *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 239, 242 (2004); *Barnhart v. Walton*, 535 U.S. 212, 218–20 (2002); *Chevron*, 467 U.S. at 842–43.

Agencies often articulate policy decisions in terms of their consistency with governing law; but the agency's mandate is implementation, not interpretation, and judicial deference only recognizes lawful exercises of discretion within the parameters of courts' reading of the law.

In keeping with that understanding, if the law grants an agency expansive discretion over *both* rule articulation and rule interpretation in respect of a given matter, courts should defer accordingly to the agency's exercises of both sorts of discretionary authority. A law could, in other words, create a space within which agencies are free to act without judicial oversight, not merely in setting a general rule or policy but also in subsequently elaborating the meaning of the rule or policy in an interpretive document or in an action applying the rule or policy. See, e.g., *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–98 (1991); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 151 (1991). Specific constitutional provisions set limits on congressional power to grant such discretion, but so long as none of these provisions is breached, agencies may enjoy freedom from judicial review of some dimension over both general policy-making and specific actions implementing agency policies and priorities. See, e.g., *Webster v. Doe*, 486 U.S. 592 (1988) (*Webster*); *Heckler v. Chaney*, 470 U.S. 821 (1985) (*Chaney*).

However, *there is no basis for according additional discretion to an agency simply because the agency adopts an ambiguous rule*, as the test used in *Auer* does. Deference recognizes discretionary authority conferred by law. Unlike ambiguity in a statute—which in some settings might indicate a legal commitment of discretion to an agency—there is *no power in*

an agency to confer additional authority on itself. That is as true of the agency acting by indirect means as by a clear statement asserting its additional authority.

A "matryoshka doll" (Russian nesting doll) approach to delegation of power—allowing successive waves of deference from unclear statutes and rules, one after another—has no basis in law. The broad rule of deference to agency self-interpretation embraced in *Auer* is not found in the APA or in the law preceding the APA. See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L. J. 908, 924–27, 989–90 (2017) (*Origins*); Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531, 537–38, 566–79 (2018) (Auer *Deference*); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo. J.L. & Pub. Pol'y 103, 105–10 (2018) (*Review*).

Further, *Auer* is not consistent with the approach to rule analysis used by this Court in *Seminole Rock* itself, the case principally relied on in *Auer*. In fact, the contrast between *Seminole Rock* and *Auer* illustrates why the rule announced in *Auer* should be clearly and unambiguously renounced. In reaching its decision in *Seminole Rock*, this Court gave ample indication that it *did not defer* to the Administrator of the Office of Price Administration (OPA) in determining the meaning of the regulation at issue. See Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, Notice & Comment (Sept. 12, 2016), available at http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/ [https://perma.cc/CLR4-DTWQ] (*Hart's Brief*); Michael P. Healy, *The Past, Present and Future of* Auer *Deference* Mead, *Form and Function*

in Judicial Review of Agency Interpretations of Regulations, 62 Kansas L. Rev. 633, 637–40 (2014). The Court's opinion repeatedly emphasized ways in which the Administrator's interpretation matched the justices' view of the proper reading of the rule, hardly the hallmark of judicial deference. See *Seminole Rock*, 325 U.S. at 415–18.

Even if the justices in *Seminole Rock* did defer to the Administrator, in keeping with the statement of deference in the opinion of the Court, that deference would have been defensible on the same grounds as *Chevron* deference—not because deference based on regulation is analogous to deference based on statutory authorization but because the OPA's interpretation was articulated simultaneously with the adoption of its rule and was published along with the rule *at the time*. See *Seminole Rock*, 325 U.S. at 417. The agency not only interpreted the rule consistently but essentially did everything that would have been done if the interpretation were part of the rule itself. See Cass, Auer *Deference*, *supra* at 549–50. So far as OPA had discretion to adopt rules implementing relevant provisions of the Emergency Price Control Act of 1942, Pub. L. 77-421, 56 Stat. 23, that discretion logically could have extended to the interpretation at issue in *Seminole Rock*.

The facts of *Auer*, and the implications of extending discretion to the agency's position in that case, stand in stark contrast. The Department of Labor rule at issue in *Auer*, implementing a provision of the Fair Labor Standards Act (FLSA), became effective in 1973, was amended in 1975, and was only interpreted by the Secretary of Labor more than two decades later in an *amicus* brief filed at this Court's request in the *Auer* case—the very case that gave deference to the

Department's rule interpretation. This Court emphasized that the Department's interpretation was reasonable, *Auer*, 519 U.S. at 461–62, certainly a basis for *agreement* with that interpretation, but there was no finding respecting any matter that might have supported *deference* to it. The Court did not find that the law granted expansive discretion to the Secretary over interpretation of the provision at issue, that the matter at issue was one traditionally within the prerogative of the Executive branch, or that the matter was constitutionally assigned to Executive authority. These factors might provide bases for finding a legal commitment of expanded discretionary authority. See, e.g., *Chaney*, 470 U.S. at 830–35.

However, permitting the exercise of such authority over interpretation of legally binding rules carries risks even in those contexts. Two risks in particular have been emphasized.

First, permitting an agency expansive leeway to interpret and apply an unclear rule risks unfair surprise in its application of the rule to persons having no reasonable opportunity to anticipate the agency's action. See, e.g., *Christopher*, 132 S.Ct. at 2167; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007); *Martin*, 499 U.S. at 157 (1991). Second, deference to agency interpretations of unclear rules may encourage strategic behavior, intentionally reducing rule clarity in some instances to preserve agency flexibility. See, e.g., *Christopher*, 132 S.Ct. at 2168; *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

Although some scholars have found these risks sufficient to preclude deference to *any* agency rule interpretation, see, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 659–60, 664–69 (1996), the risks are not demonstrably present in *all* instances of agency rule interpretation. Moreover, granting deference only to the extent of actual delegated discretion both reduces those risks and limits them to circumstances in which enacted law conveys lawmakers' determinations that the risks in those specific settings are outweighed by benefits from granting that discretion. See, e.g., Cass, Auer *Deference*, *supra* at 567–80; Aaron L. Nielson, *Beyond* Seminole Rock, 105 Geo. L.J. 943, 989–1000 (2017) (*Beyond*); Walker, *Review*, *supra* at 1007–10. The deference appropriate on this view is not a *general* deference to interpretation of ambiguous rules, rooted in the rule ambiguity itself, but deference to *a particular exercise of discretion committed by law*.

The exact showing that is required to demonstrate that commitment need not be encapsulated in a single test. There are sound reasons for requiring relatively explicit commitment of discretion in some cases, see, e.g., *King v. Burwell*, 135 S.Ct. 2480, 2488–89 (2015); *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468–71 (2001) (*American Trucking Associations*); *Food and Drug Administration v. Brown & Williamson*, 529 U.S. 120, 159–60 (2000) (*Brown & Williamson*); *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994) (*MCI Telecommunications*), and in other instances for permitting that commitment to be inferred from the nature of the authority granted to an agency and the broader statutory structure containing the commitment of authority, see, e.g., *National*

Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967, 981, 989 (2005); *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. at 830–35. At a minimum, however, similar evidence of legislative commitment of discretionary authority should be required for deference to the interpretation and application of rules as for establishing the scope of discretionary agency authority in adopting them. That manifestly is not the rule announced in *Auer*.

We urge the Court to overrule the deference test embraced in *Auer* and to limit deference associated with *Seminole Rock* to instances in which applicable law grants discretion to an agency over the interpretation of the agency's regulation.

ARGUMENT

I. Deference to Agency Decisions Depends on Legal Commitment of Discretionary Authority.

A. Both the APA and *Chevron* Make Judicial Review Standards Dependent on Statutorily-Granted Discretion.

Although judicial deference to administrative determinations varies with the context and nature of the determination, deference uniformly requires legal commitment of discretionary authority to the agency in respect of the decision at issue. The deference rule announced in *Auer*, 519 U.S. at 461, mandating acceptance of an agency interpretation of its rules unless "plainly erroneous or inconsistent with the regulation," should be evaluated in relation to the underlying instructions in the APA's provisions for judicial review, 5 U.S.C. §§ 701, 706, as well as concepts associated with *Chevron*.

1. The Administrative Procedure Act Mandates Judicial Decision on Interpretation of Law Unless Review Is Precluded or Committed to Agency Discretion by Law.

The Administrative Procedure Act (APA), setting out the general rules governing judicial review of administrative action, directs reviewing courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and *determine the meaning or applicability of the terms of an agency action*," 5 U.S.C. § 701 (emphasis added), but excepts review "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 706. It also directs that courts are to "hold unlawful and set aside agency actions . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C), as well as actions the court finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Consistent with prior practice, the text plainly assigns the law-interpreting function to reviewing courts while directing the courts to respect the degree of discretion given to agencies, checking exercises of discretion for various forms of unreasonableness, rather than of correctness (except for instances in which law precludes review even of that limited sort). See, e.g., Cass, *Rethinking*, *supra* at 1311–14.

The degree of discretion given to an agency is not always expressly stated in the governing statutory text. The understanding, both pre- and post-APA, has been that *some* commitments of broad authority to an agency embody grants of discretion and that the breadth and ambiguity of the terms of a legal authorization for administrative action may evidence that

meaning.[2] See, e.g., *National Labor Relations Bd. v. Hearst Publications, Inc.*, 322 U.S. 111 (1943); *Gray v. Powell*, 314 U.S. 402 (1941); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); Ronald A. Cass, Colin S. Diver, Jack M. Beermann & Jody Freeman, Administrative Law: Cases & Materials 154–58, 166–70 (7th ed. 2016); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992). So, for example, the Communications Act of 1934's assignment to the Federal Communications Commission (FCC) of authority to allocate and license radio stations in ways that serve "the public interest, convenience, and necessity," 47 U.S.C. §§ 307, 309, necessarily conveys discretionary authority. See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Having framed the agency's authority in obviously broad fashion, Congress did not need to add "and the FCC has discretion to decide what 'the public interest, convenience, and necessity' means" at least within some domain. The law plainly lets the Commission choose among a variety of criteria for allocating broadcast licenses, but equally plainly would not permit the Commissioners to give prefer-

---

[2] The evidence of legislative commitment of discretion does not, of course, resolve the question whether the degree and nature of the discretion accorded violate strictures on delegation of legislative power. See, e.g., *Loving v. United States*, 517 U.S. 748, 757–58 (1996); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825); Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035, 1042–43 (2007); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol'y 147, 151–61, 177 (2016) (*Delegation Reconsidered*); Gary S. Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 335–53 (2002) (*Delegation*); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015).

ence first to their own relatives and friends. While the FCC enjoys discretion to make policy choices implementing the broad statutory directive, decision on the degree of discretion accorded and on the location of its outer bounds remains a question of law for judicial disposition.

2. The *Chevron* Decision Does Not Change Scope-of-Review Requirements of the Administrative Procedure Act and Related Law.

That same understanding informed the Court's decision in *Chevron*. As this Court later explained:

> We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Smiley v. Citibank (South Dakota), N.A., 517 U.S. at 735, 740–41 (1995).

Chevron was *not* intended as a free-standing new test but instead as a guide to interpreting the scope of discretion granted to agencies and the legally appropriate deference that discretion conveyed.[3] See, e.g., Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 Nw. L. Rev. 551, 554 (2012) (*Puzzle*).

---

[3] Although the relevant judicial review provision for *Chevron* was contained in the Clean Air Act Amendments of 1977, 42 U.S.C. 7607(b)(9), rather than the APA, that provision restated almost verbatim APA § 706.

Although *Chevron* often is characterized as demanding judicial deference on the *interpretation* of the governing *law*, it is more accurate to say that *Chevron* addresses the discretion for administrative officials to make decisions on *policy* matters respecting *implementation* of law within a statutorily-sanctioned range of discretionary decisions. See, e.g., Cass, *Rethinking*, *supra* at 1314–15; Merrill & Hickman, *supra* at 836, 863–64, 870–72; Strauss, *supra* at 1145–50. That is why the opinion in *Chevron* observed that courts are "the final authority on issues of statutory construction," and are expected to use "traditional tools of statutory construction" to interpret statutory directives. *Chevron*, 467 U.S. at 843 n.9. That also is why deference generally does not preclude review to assure reasonableness of agency action, as deference extends to agency decisions so far—but *only* so far—as the governing law (interpreted by courts) commands. See, e.g., *Household Credit Services, Inc. v. Pfennig*, 541 U.S. at 239, 242; *Barnhart v. Walton*, 535 U.S. at 218–20; *Chevron*, 467 U.S. at 842–43.

Hence, *Chevron* itself did not reverse the long-held understanding that *courts* have the obligation, when their jurisdiction is properly invoked, "to say what the law is," *Marbury v. Madison*, 5 U.S. at 177. *Chevron* did not contradict the general directive for courts hearing challenges to agency action to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," APA, at 5 U.S.C. § 706, and to reverse any action found by a reviewing court to be "not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction,

authority, or limitations, or short of statutory right." *Id.*, at § 706(2)(1)–(3).[4]

B. *Chevron* Deference Has Been Denied Where Indicia of Discretionary Authority Are Absent.

Judges and scholars have offered different explanations for the manner in which courts do and should evaluate the scope of administrators' discretion. Then-judge Stephen Breyer, for example, said that courts "have looked to practical features of the particular circumstance to decide whether it 'makes sense,' in terms of the need for fair and efficient administration of that statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation." Breyer, *supra* at 370. Justice Scalia, quoting from two court of appeals decisions, stated his approach this way:

> The extent to which courts should defer to agency interpretations of law is ultimately "'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.'"

Scalia, *supra* at 516 (quoting *Process Gas Consumers Group v. United States Department of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (*en banc*), quoting *Constance v. Secretary of Health & Human Services*,

---

[4] As relevant to *Chevron*, the same directive is codified at 42 U.S.C. 7607(b)(9)(A)–(C). Saying that the decision in *Chevron* is based in a finding of legislative delegation of discretionary authority, of course, does not elide questions about the strength of the evidence used by the Court to make that finding or the manner in which the reasonableness of an agency's exercise of that authority is addressed. See, e.g., Merrill & Hickman, *supra* at 833–34.

672 F.2d 990, 995 (1st Cir. 1982), *cert. denied*, 461 U.S. 905 (1983)).

Despite differences in approach, the common ground for granting deference is a conclusion that the law, explicitly or implicitly, grants discretion to a given administrative official to make a particular determination within bounds set by the relevant statute. Consistent with that understanding, *Chevron*'s "Step One" determines the room for discretion under law, see, e.g., *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987); *Chevron*, 467 U.S. at 843 n.9, while its second step assesses whether the agency has reasonably exercised that discretion, see, e.g., *Household Credit Services., Inc. v. Pfennig*, 541 U.S. at 239, 242; *Barnhart v. Walton*, 535 U.S. at 218–20; *Chevron*, 467 U.S. at 842–43.

The Court has made clear that decision on the scope of discretion left to an agency, as well as the terms of commitment of authority to an agency more generally, depends on evidence respecting statutory meaning in particular settings. See, e.g., *King v. Burwell*, 135 S.Ct. at 2488–89; *Brown & Williamson*, 529 U.S. at 159. At times, the judgment respecting the scope of authority left to an agency has turned on the consistency of a commitment of discretion to the broader statutory framework. See, e.g., *King v. Burwell*, 135 S.Ct. at 2488–89; *American Trucking Associations*, 531 U.S. at 468–71; *Brown & Williamson*, 529 U.S. at 159–60; *MCI Telecommunications*, 512 U.S. at 231. In other cases, this Court has looked to additional factors to determine the degree of discretion granted to particular agency decisions and, consequently, the deference due to them. See, e.g., *United States v. Mead*

Corp., 533 U.S. 218, 229–31, 236 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Although the cases do not uniformly find a single controlling factor for determining the scope of agency authority, the linchpin for *Chevron* analysis, as for the APA and prior law, remains determining the scope of legally conferred discretion, either expressly committed by statute or fairly inferred from the law—as scholars across the spectrum of views on administrative law have explained. See, e.g., Cass, *Rethinking*, *supra* at 1313; Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 Chi.-Kent L. Rev. 1377, 1379 (1997) (*Reconceptualizing*); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1257 (1997); Merrill & Hickman, *supra* at 872; Merrill, *Puzzle*, *supra* at 554; Strauss, *supra* at 1145, 1147, 1158–61, 1163.

II. A General Rule of Deference to Agency Interpretation of Rule Ambiguity Is Contrary to Law, Pre-*Auer* Precedent, and Constitutional Structure.

A. Deference to Agency Rule Interpretation Is Appropriate Only for Decisions Clearly Committed to Agency Discretion by Law; It Should Not Be Predicated on Rule Ambiguity.

1. Deference Follows Legally Authorized Discretion Both for Rules and for Specific Decisions.

The law on standards of judicial review makes clear that deference is the corollary of legally committed discretion. In keeping with that understanding, if the law grants an agency expansive discretion over

both rule articulation and rule interpretation on a particular matter, courts should defer to the agency's exercises of both types of discretionary authority. That has been the path followed by this Court when it has found that laws granted an agency discretion to act without judicial oversight to some extent in setting a general rule or policy and also in elaborating the meaning of the rule or policy. See, e.g., *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. at 696–98; *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. at 151.

Specific constitutional provisions set limits on congressional power to grant such discretion, but so long as none of these provisions is breached, agencies may enjoy broad or narrow freedom from judicial review of both general policy-making and specific actions implementing agency policies and priorities. See, e.g., *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. 830–35. Consider, for example, Section 102(c) of the National Security Act of 1947, which states that "the Director of Central Intelligence may, in the discretion of the Director, terminate the employment of any officer or employee of the Central Intelligence Agency whenever the Director deems the termination of employment of such officer or employee necessary or advisable in the interests of the United States." 50 U.S.C. § 3036(e)(1). The deference owed to such an exercise of legally granted discretionary authority follows from the APA's limitation of review where a matter is "committed to agency discretion by law." *Webster*, 486 U.S. at 600. The conclusion should be no different if the Director acts through adopting a rule and then implementing the rule or through making relevant determinations on policy and application in a particular decision. See, e.g., Nielson, *Beyond*, *supra* at 964–79 (exploring relation of rulemaking and adju-

dication in effectuating agency policy); Matthew Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449, 1470–71, 1491–94 (2011) (same).

2. An Agency Action Cannot Expand the Scope of Legally Sanctioned Discretionary Authority for the Agency and Cannot Limit the Scope of Judicial Review.

However, *there is no basis for according additional deference to an agency simply because the agency adopts an ambiguous rule*, as the rule restated in *Auer* does. Deference recognizes discretionary authority. Unlike ambiguity in a statute—which in some settings might indicate a commitment of discretion to an agency—there is no power in an agency to confer additional discretionary authority on itself and no reason to infer such additional discretion from adoption of a rule that admits of various interpretations that are not "plainly erroneous or inconsistent with the regulation," *Auer*, 519 U.S. at 461.

If such self-delegation were possible and were to be found merely in a regulation's ambiguity, what sort of limiting principle would constrain that power? Would an ambiguous agency interpretation of its own general rule confer broader discretion over the rule's application, beyond the discretion "created" by the rule's own ambiguity? A "matryoshka doll" (Russian nesting doll) approach to delegation of power—allowing a cascade of successive waves of deference (implying a cascade of successive waves of delegated discretion) from unclear statutes or rules—would open the door to empowering agencies, not Congress, to dictate how much or how little scrutiny courts can give to their decisions.

To test the logic of allowing that result, imagine an agency declaring, in the context of adopting a rule, that it would enjoy expansive authority to interpret the rule in the future. It is inconceivable that this Court would credit such a declaration. While an agency may receive deference for exercising delegated discretion, the power to decide how much discretion to repose in the agency rests strictly with the lawmaking branches acting through constitutionally prescribed means.[5]

Nothing in this Court's jurisprudence or in the law supports a contrary result. Except for the one statement in *Seminole Rock*, the broad rule of deference to agency self-interpretation embraced in *Auer* is not found in the APA or in the law or decisions of this Court preceding the APA. See, e.g., Bamzai, *Origins*, *supra* at 908, 924–27, 989–90; Cass, Auer *Deference*, *supra* at 537–38, 566–79; Walker, *Review*, *supra* at 105–10.

3. A Broad Rule of Deference Is Not Supported by this Court's Decision in *Seminole Rock*.

Further, notwithstanding the statement of the general rule of deference to agency interpretation of rules in *Seminole Rock*, *Auer* is not consistent with the approach to rule analysis in *Seminole Rock* itself, the

---

[5] As already noted, this authority must be exercised within the bounds of constitutional constraints on who can discharge the powers and duties legally assigned, see, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986), how they can be carried out, see, e.g., *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), and what duties can be assigned, see, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

case principally relied on in *Auer*.[6] In fact, the contrast between *Seminole Rock* and *Auer* illustrates why the rule announced in *Auer* should be clearly and unambiguously renounced.

In reaching its decision in *Seminole Rock*, this Court gave ample indication that it *did not defer* to the Administrator of the Office of Price Administration in determining the meaning of the regulation at issue. See Bamzai, *Hart's Brief, supra*; Cass, Auer *Deference*, *supra* at 548–49; Healy, *supra* at 637–40. The Court's opinion repeatedly emphasized ways in which the OPA interpretation matched the justices' view of the proper reading of the rule, hardly the hallmark of judicial deference. See *Seminole Rock*, 325 U.S. at 415–18. The case turned on which of several methods for determining the relevant price comparator, under the rule for assessing consistency with the mandated price freeze, applied to the particular contracts at issue. The Court's opinion declared, among other things, that "*[a]s we read the regulation* . . . [the method chosen by OPA] *clearly applies* to the facts of this case," *id.* at 415 (emphasis added), and further stated "*[o]ur reading*

---

[6] The only other citation supporting *Auer*'s conclusion that the courts must defer to an agency's interpretation of its own rule unless "plainly erroneous or inconsistent with the regulation" was *Robertson v. Methow*, 490 U.S. 332, 359 (1989) (*Robertson*), which the *Auer* decision cited for its quotation of *Seminole Rock*. See *Auer*, 519 U.S. at 461. *Robertson*, after dealing extensively with questions relating to interpretation of the *statutory* requirements placed on agencies in respect of environmental evaluations by the National Environmental Protection Act (NEPA), 83 Stat. 852, 42 U.S.C. § 4231 et seq., briefly addresses the contention that the Forest Service violated its own regulations. The Court concluded that the agency had acted reasonably in choosing how to implement its obligations under relevant statutory provisions and its own rules. See *Robertson*, 490 U.S. at 357–59.

of the language . . . [at issue] . . . *compel[s]* the conclusion" reached by OPA respecting the meaning of the rule, *id.* at 418 (emphasis added) (footnote omitted).

The contradiction between the opinion itself and the rule for which *Seminole Rock* is known, quoted in *Auer*, is captured in Professor Healy's observation that this "rule of deference did not determine the result in the case. The Court itself construed the regulation and found that it provided a clear answer to the legal question." Healy, *supra* at 639. See also Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47, 60 (2015); Manning, *supra* at 619 (1996); Stephenson & Pogoriler, *supra* at 1454.

Even if the justices in *Seminole Rock* did defer to OPA, in keeping with the statement of deference in the opinion of the Court, deference would have been defensible on essentially the same grounds as those supporting *Chevron* deference. If the law being implemented (the Emergency Price Control Act of 1942) granted OPA discretion to select among possible approaches to freezing prices during war-time, the agency's interpretation of its rule would stand on the same ground because that interpretation was articulated simultaneously with the adoption of the rule and was published along with the rule *at the same time*. See *Seminole Rock*, 325 U.S. at 417. The agency not only interpreted the rule consistently but essentially did everything that would have been done if the interpretation were part of the rule itself. See Cass, Auer *Deference*, *supra* at 549–50. To the extent deference should have been accorded to OPA policy decisions on implementing the law (via regulation), the same deference would apply *in this context* to the OPA's explanation of its regulation. *Seminole Rock*,

thus, cannot provide a precedent for a general canon of deference to agency interpretation of its own rules.

4. *Auer*'s Deference Unlawfully Expands the Deference Previously Accorded to Agency Rule Interpretations.

The facts of *Auer*, and the implications of extending discretion to the agency's position in that case, stand in stark contrast to *Seminole Rock*. The Department of Labor rule at issue in *Auer*, implementing a provision of the Fair Labor Standards Act (FLSA)—exempting executive, administrative, or professional employees from overtime pay requirements under the Act—became effective in 1973, was amended in 1975, and was only interpreted by the Secretary of Labor more than two decades later in an *amicus* brief filed at this Court's request in the *Auer* case—the very case that gave deference to the Department's rule interpretation.

This Court concluded that the Department's interpretation of the rule at issue was reasonable after comparing the Department's construction of the critical phrase being construed ("subject to") with dictionary definitions of that phrase and evaluating the application of the Department's interpretation. *Auer*, 519 U.S. at 461–62. It is not clear whether, without deference, the Court would have reached the same conclusion respecting the regulation's meaning, but taking the opinion on its own terms, *Auer* accorded deference without critical inquiry into the scope of discretion conferred on the Department of Labor under the FLSA. The opinion's sole statement that the law gave the Department broad discretion to decide how to implement the law's underlying provision, *Auer*, 519 U.S. at 456, did not explain why this constituted a statutory commitment of discretionary authority over both the *initial articulation of a rule* for assessing the

exemption's operation and *subsequent interpretation of that rule*. Nor did the Court find that the matter at issue was traditionally within the prerogative of the Executive branch, or that the matter was constitutionally assigned to Executive authority—questions addressed in cases such as *Webster* and *Chaney*. See *Auer*, 519 U.S. at 461–63. Notably, in a subsequent case challenging the Department's interpretation of regulations under the FLSA, the Court unanimously declined to accord the same deference granted in *Auer*. See *Christopher*, 132 S.Ct. at 2167–73; *id.* at 2175 (Breyer, J., dissenting, on other grounds).

The *Auer* Court rejected objections that the interpretation was first advanced in a brief in the case in which it was being applied, largely because the Department was not a party to the case and, therefore, could not be accused of unfairly surprising affected parties to advance its own litigating interests. *Auer*, 519 U.S. at 462. Yet the decision did not recognize that the interpretation of the rule, more than twenty years after its adoption, could alter settled expectations even if the Department's reading of the rule did not advance its own immediate litigation interests. In particular, the Court did not acknowledge that adopting one interpretation among a set of plausible possibilities without employing procedures that accord greater notice to those affected could work exactly the sort of unfair surprise criticized elsewhere. See, e.g., Stephenson & Pogoriler, *supra* at 1451–52, 1484–96.

B. *Auer* Deference Risks Violation of Due Process Guarantees through Unfair Surprise in Rule Application and Strategic Behavior in Rule Design.

Although a legal commitment of expanded discretionary authority could command deference, administrative

discretion over interpretation of legally binding rules carries risks even in settings where that authority exists.

Two risks in particular have been stressed. First, permitting an agency expansive leeway to interpret and apply an unclear rule risks unfair surprise in application of the rule to persons having no reasonable opportunity to anticipate the agency's action. See, e.g., *Christopher*, 132 S.Ct. at 2167; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. at 170–71; *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. at 157. This risk is in tension with due process requirements respecting notice of legally binding rules. See, e.g., *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). While the demand for rule clarity is most often articulated when criminal punishment is involved, concerns for fairness, notice, and legality are relevant in a far broader set of contexts. See, e.g., *Federal Communications Commission v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2318 (2012).

A second risk of *Auer* deference is that crediting agency interpretations of unclear rules may encourage strategic behavior, reducing rule clarity in some instances in order to preserve agency flexibility. See, e.g., *Christopher*, 132 S.Ct. at 2168; *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. at 69 (Scalia, J., concurring); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. at 525 (Thomas, J., dissenting). As Justice Scalia put the point:

> [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability pur-

> poses of rulemaking and promotes arbitrary government.

Talk America, Inc. v. Michigan Bell Tel. Co., 564 U.S. at 69 (Scalia, J., concurring). See also Walker, *Review*, *supra* at 4–5.

Both of these are serious risks, although each may be overstated. While some scholars have found these risks sufficient to preclude deference to *any* agency rule interpretation, see, e.g., Manning, *supra* at 659–60, 664–69, the risks are not demonstrably present in *all* instances of agency rule interpretation. Professor (now Dean) Manning postulated that allowing a rule writer to decide on the rule's meaning inevitably violates the imperative (embedded in the Due Process Clauses) of an impartial adjudicator. See Manning, *supra* at 631–54. He concludes that any deference in that context is unconstitutional. *Id.* at 654–57.

So far as the concern is *biased* rule interpretation, this conclusion is overbroad. See Cass, Auer *Deference*, *supra* at 561–63. For example, the issues in *Seminole Rock*—which among the alternative methods for calculation of the price comparator was appropriate for the crushed stone contracts being evaluated and how the spacing of sales and delivery of the stone fit OPA's rule—were "narrow, technical, and affected by experience associated with the work of the Office of Price Administration." *Id.* at 562. There "was no reason to expect the administrative decision makers to have a bias" on that question. *Id.* Similarly, the Director of the CIA's decisions on personnel matters (the question presented in *Webster*) would not be more likely to raise concerns of bias—and deference to his determination, thus, would not be more problematic—if the Director were interpreting his own rule on those decisions than if he were acting in specific matters

without a rule. These alternative means of proceeding are generally available to administrators. See, e.g., *Securities & Exchange Commission v. Chenery*, 332 U.S. 194, 203 (1947) (*Chenery II*); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. Chi. L. Rev. 1383, 1405 (2004); Nielson, *Beyond*, *supra* at 948; Glen O. Robinson, *Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485, 485–86 (1970).

Strategic behavior is a general concern with all decisions, but it is not universally a risk that seriously compromises the exercise of delegated authority. Professor Walker has found that administrators are generally aware of *Chevron* deference and take it into account to some degree in fashioning decisions, but they are less aware of *Auer* deference and less likely to consider it in rule design. See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1059–66 (2015). Further, politically-responsive officials may prefer to bind future decision-makers, rather than to adopt rules that expand their discretion. See, e.g., Cass, Auer *Deference*, *supra* at 564–65; Aaron L. Nielson, *Sticky Regulations*, 85 U. Chi. L. Rev. 85, 138–39 (2018). This does not eliminate concerns with strategic behavior, especially so far as long-term staff have the laboring oar in rule design, see, e.g., Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169, 185–87, 216–19 (1978), but it does temper the concerns.

C. *Auer* Deference Undermines Constitutional Separation of Powers.

The more trenchant problem of *Auer* deference is that it grants a power to administrative agencies that undermines the constitutional structure of separated powers. The Constitution vests "all legislative powers"

granted in that document in the Congress and specifies the essential mechanisms for exercising the lawmaking power. U.S. Const., Article I, sec. 1, sec. 7. The judicial power is vested in a Supreme Court and inferior courts established under Article III's requirements for judges with life tenure and irreducible pay. U.S. Const., Article III, sec. 1.

The division of powers does not prohibit statutory grants of authority to executive agencies to make rules to guide the exercise of their powers in implementing the laws or to make adjudicative decisions in the exercise of those powers. However, it does prohibit exercises of lawmaking power—including exercises of power not denominated as formal lawmaking—outside of the prescribed form of bicameral concurrence and presentment, *Clinton v. City of New York*, 524 U.S. 417 (1998); *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), or of the judicial power outside of Article III courts, *Stern v. Marshall*, 564 U.S. 462 (2011); *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

While striking down those breaches of constitutional structure, this Court has permitted statutory assignments of authority that in our (and many other scholars') view constitute the lawmaking power that the Constitution commits exclusively to Congress. See generally Alexander & Prakash, *supra*; Cass, *Delegation Reconsidered*, *supra*; Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. Legal Analysis 121 (2016); Lawson, *Delegation*, *supra*; Rao, *supra*; David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 Am. U. L. Rev. 355 (1987).

These judicial decisions address authority that has been clearly, if improperly, assigned to other bodies through formally adopted law. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 371–79 (1989); *Yakus v. United States*, 321 U.S. 414, 420–23 (1944). In other words, they represent acquiescence in the legislature's determination that a particular exercise of authority is properly reposed in a given government agency.

Auer's general directive for courts to give conclusive effect to any administrative interpretation of a regulation that is not clearly erroneous or inconsistent differs from the typical case rejecting an unconstitutional-delegation complaint: *Auer* effectively grants power for agencies to make legally binding rules (and to give them conclusive effect) in contravention of the general statutory rule for review of agency decisions and without a finding that the discretion being exercised was actually delegated by law. See Cass, Auer *Deference*, *supra* at 579–80. While *Auer* formally deals with interpretation, not adoption, of agency rules, the process of interpreting rules that are ambiguous easily can become a vehicle for altering the rules' content. Appreciation of this problem supported this Court's decision that just as substantive rules with the force of law must be adopted through notice-and-comment proceedings, so, too, must such rules be amended through notice-and-comment proceedings. See, e.g., *Perez v. Mortgage Bankers Association*, 135 S.Ct. 1199, 1206 (2015) (*Mortgage Bankers Association*); *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox Television Stations*).

Auer's acceptance of judicial deference without a considered finding of legal commitment to the agency of discretion over the matter being decided—over not

just one level of decision-making but over the second level of follow-on interpretation and application—stands in marked contrast to decisions like *Mortgage Bankers Association* and *Fox Television Stations*. Blurring the line between an initial grant of discretion over a particular approach to decisions—over a policy judgment—on the one hand, and decisions that construe the policy, on the other, makes it more difficult to maintain constitutional divisions between lawmaking and law-implementing functions.

Academic arguments in support of *Auer* often re-cast its rule to more closely accord with more focused judicial findings of legislative authorization. For example, Professors Sunstein and Vermeule defend a version of *Auer* that is narrower than the strong deference principle universally quoted from the case, borrowing emphasis instead from the majority decision in *City of Arlington v. Federal Communications Commission*, 133 S.Ct. 1863 (2013), on courts' role in constraining agency interpretations to fit the interpreted text. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297, 310–16 (2017). Certainly, to the extent courts exercise the sort of critical judgment about the extent of discretion that is permitted to an agency and assure that the agency has not strayed outside the bounds of its delegated discretion (as Professors Sunstein and Vermeule suppose), *Auer* deference would essentially collapse into the inquiries required by Section 706 of the APA and also would constrain the exercise of administrative judgment more closely to fit constitutional structure. Unfortunately, the tailored *Auer* rule that emerges in such academic writings is not the actual rule announced in the case.

The significant argument, both in cases and in academic debates, is over *how* to decide the scope of discretion an agency enjoys. *Chevron* states a general canon of judicial construction that permits courts to infer discretion from statutory ambiguity, with some exceptions. See *Chevron*, 467 U.S. at 843; see also *King v. Burwell*, 135 S.Ct. at 2488–89; *Brown & Williamson*, 529 U.S. at 159. *Auer*, taken at face value, states a general rule of deference to agency rule interpretations *without* requiring a clear statutory grant of discretionary authority or even a strong basis for inferring such a grant. See *Auer*, 519 U.S. at 461. As already noted, that departs from appreciation for the judicial role of independent determination on the extent of administrative discretion, which is common ground to a wide array of scholars. See, e.g., Cass, *Rethinking*, *supra* at 1313; Lawson, *Reconceptualizing*, *supra* at 1379; Levin, *supra* at 1257; Merrill & Hickman, *supra* at 872; Merrill, *Puzzle*, *supra* at 554.

Auer's rule of deference should be replaced with an insistence that law fairly clearly evidence the commitment to the agency of the particular sort and level of discretion exercised. This would not wholly eliminate risks of unfair surprise and strategic behavior, but it would limit the exercises of discretion that are most likely to create those risks to circumstances in which enacted law conveys lawmakers' determinations that, in those specific settings, these risks are outweighed by the benefits expected from granting that discretion. See, e.g., Cass, Auer *Deference*, *supra* at 567–80; Nielson, *Beyond*, *supra* at 989–1000; Walker, *Review*, *supra* at 1007–10. Unlike *Auer*, the deference appropriate on this view is not a *general* deference to interpretation of ambiguous rules, rooted in the rule ambiguity itself, but deference to *a particular exercise of discretion committed by law*.

The exact showing that is required to demonstrate that commitment need not be encapsulated in a single test. There are sound reasons for requiring relatively explicit commitment of discretion in some cases, see, e.g., *King v. Burwell*, 135 S.Ct. at 2488–89; *American Trucking Associations*, 531 U.S. at 468–71; *Brown & Williamson*, 529 U.S. at 159–60; *MCI Telecommunications*, 512 U.S. at 231, and in other instances for permitting that commitment to be inferred from the nature of the authority granted to an agency and the broader statutory structure setting the terms of that authority, see, e.g., *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. at 981, 989; *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. 830–35. At a minimum, however, similar evidence of legislative commitment of discretionary authority should be required for deference to the interpretation and application of rules as to agency authority to adopt them. That manifestly is not the rule announced in *Auer*.

We urge the Court to overrule *Auer*, to reject the test embraced in that case, and to limit deference associated with *Seminole Rock* to instances in which courts find that applicable law grants discretion to an agency over interpretation of the agency's regulation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RONALD A. CASS
Counsel of Record
CASS & ASSOCIATES, PC
10560 Fox Forest Drive
Great Falls, VA 22066-1743
(703) 438-7590
roncass@cassassociates.net

January 31, 2019

Counsel for Amici Curiae

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE CATO INSTITUTE, PROFESSORS JONATHAN H. ADLER, RICHARD A. EPSTEIN, AND MICHAEL W. MCCONNELL, AND CAUSE OF ACTION INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

John J. Vecchione
CAUSE OF ACTION INSTITUTE
1875 Eye St., NW, Suite 800
Washington, D.C. 20006
(202) 499-2415
john.vecchione@causeofaction.org

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

January 31, 2019

QUESTION PRESENTED

Whether the Supreme Court should overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. *AUER* CONTRAVENES WELL-ESTABLISHED ADMINISTRATIVE LAW NORMS 6

A. *Auer* Undermines the Separation of Powers and Due Process 6

B. *Auer*'s Distinct and Troubling Infirmities Stand Out in Comparison to *Chevron* 8

C. Recent Legal Controversies Demonstrate *Auer* at Its Worst 13

II. OVERTURNING *AUER* WOULD NOT BURDEN COURTS OR AGENCIES 15

A. If the Court Overturned *Auer*, Agencies Would Retain *Skidmore* Deference 15

B. Empirical Research Demonstrates the Insignificant Administrative Burden of Replacing *Auer* Deference with *Skidmore* 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) 9

Arizona v. Rumsey, 467 U.S. 203 (1984) 4

Auer v. Robbins, 519 U.S. 492 (1997) 2, 3, 8

Bible v. United Student Aid Funds, Inc., 807 F.3d 839 (7th Cir. 2015) 4

Bowles v. Seminole Rock, 325 U.S. 410 (1945) 9, 16-17

Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722 (6th Cir. 2013) 8

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 8

Christensen v. Harris County, 529 U.S. 576 (2000) 11

Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012) 16, 17-18

City of Arlington, Tex. v. F.C.C., 569 U.S. 290 (2013) 2, 9, 12-13

De Niz Robles v. Lynch, 803 F.3d 1165 (10th Cir. 2015) 12

Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597 (2013) 3, 6, 11-12

Egan v. Del. River Port Auth., 851 F.3d 263 (3d Cir. 2017) 4

F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239 (2012) 6

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 9

G.G. v. Gloucester Cty. Sch. Bd.,
822 F.3d 709 (4th Cir. 2016) 14

Gloucester Cty. Sch. Bd. v. G.G.,
137 S. Ct. 369 (2016) 14

Goodson v. OS Rest. Servs., LLC,
No. 5:17-cv-10-Oc-37PRL,
2017 U.S. Dist. LEXIS 71923 (M.D. Fla. 2017) 4

Helvering v. Hallock, 309 U.S. 10 (1940) 5

Johnson v. McDonald,
762 F.3d 1362 (Fed. Cir. 2014) 4

King v. Burwell, 135 S. Ct. 2480 (2015) 9

Kisor v. Shulkin, 869 F.3d 1360 (Fed. Cir. 2017) 13

Kisor v. Shulkin, 880 F.3d 1378 (Fed. Cir. 2018) 3-4

M.L. Johnson Family Props., LLC v. Jewell,
237 F. Supp. 3d 528 (E.D. Ky. 2017) 4

Michigan v. E.P.A., 135 S. Ct. 2699 (2015) 12

Pereira v. Sessions, 138 S. Ct. 2105 (2018) 12

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015) 3, 11

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 16

Smiley v. Citibank (S.D.), N.A.,
517 U.S. 735 (1996) 9

Smith v. Allwright, 321 U.S. 649 (1944) 5

State Case Prokop v. Lower Loup Nat. Res. Dist.,
302 Neb. 10 (2019) 4

Talk Am., Inc. v. Mich. Bell Tel. Co.,
564 U.S. 50 (2011) 9-10

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 3, 7

United States v. Havis,
907 F.3d 439 (6th Cir. 2018) 3

United States v. Mead Corp., 533 U.S. 218 (2001) ... 10

Statutes and Regulations

20 U.S.C. § 1681 14

34 C.F.R. § 106.33 14

38 C.F.R. § 3.156(c)(1) 13

5 U.S.C. § 553(b)-(c) 7

71 Fed. Reg. 52455 (Sept. 6, 2006) 14

Other Authorities

Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, Yale J. Reg.: Notice & Comment (Sept. 12, 2006), https://bit.ly/2Rdgx2c 17

Brett Kavanaugh, Keynote Address at the Center for the Administrative State Public Policy Conference: Rethinking Judicial Deference (June 2, 2016) 3

Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effect on Agency Rules*, 119 Colum. L. Rev. 1 (2018) 18

Derek A. Woodman, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 Geo. Wash. L. Rev. 1721 (2014) 18

Erica L. Green, Katie Benner, & Robert Pear, *'Transgender' Could Be Defined Out of Existence under Trump Administration*, N.Y. Times, Oct. 21, 2018 19

Jeffrey A. Pojanowski, Revisiting *Seminole Rock*, 16 Geo. J.L. & Pub. Pol'y 87 (2018) 17

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 7

Jonathan H. Adler, *Auer Evasions*, 16 Geo. J.L. & Pub. Pol'y 1 (2018) 7

Lon L. Fuller, *The Morality of Law* (1964) 6

Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449 (2011) 10-11

Sanne H. Knudson & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47 (2015) 17

U.S. Dep't of Justice & U.S. Dep't of Educ., Opinion Letter on Transgender Students (May 13, 2016), https://bit.ly/2kQOcUa 15

William Yeatman, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L. Rev. 515 (2018) 18, 19

Rules

Fed. R. Evid. 401(a)-(b) 13

INTEREST OF THE *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Jonathan H. Adler is the inaugural Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where he teaches and writes on administrative and constitutional law, among other subjects.

Richard A. Epstein is the Laurence A. Tisch Professor of Law at NYU School of Law. He also serves as the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus and senior lecturer at the University of Chicago. He has written numerous books and articles on a wide range of legal and interdisciplinary subjects.

Michael W. McConnell is the Richard and Frances Mallery Professor and director of the Constitutional Law Center at Stanford Law School, and Senior Fellow at the Hoover Institution. He is a leading

---

[1] Rule 37 statement: Both parties received timely notice of *amici*'s intent to file this brief. Petitioner consented specifically, while Respondent lodged a blanket consent with the Clerk. Further, no counsel for any party authored this brief in any part; no person or entity other than *amici* funded its preparation or submission.

authority on the relation of individual rights to government structure, as well as constitutional law and history. Before joining Stanford, he served as a judge on the U.S. Court of Appeals for the Tenth Circuit. He has also argued 15 cases in this Court.

Cause of Action Institute ("CoA Institute") is a nonprofit, nonpartisan oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law work together to protect liberty and economic opportunity. As part of this mission, CoA Institute works to expose and prevent government misuse of power by appearing as *amicus curiae* in federal courts. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing CoA brief).

This case interests *amici* because it concerns courts' ability to check the power of the administrative state through meaningful judicial review. These *amici* previously filed a brief together in *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016) (taking up question of whether courts should defer to an unpublished agency letter), *vacated and remanded in light of new guidance document*, 137 S. Ct. 1239 (2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

Overturning *Auer v. Robbins*, 519 U.S. 492 (1997), would be a modest but important check on the "the danger posed by the growing power of the administrative state." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 315 (2013) (Roberts, C.J. dissenting).

Criticisms of *Auer* deference are well-known and have been ably aired by past and present members of

this Court. *See, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211–13 (2015) (Scalia, J., concurring) (arguing that *Auer* deference undermines procedural safeguards for administrative policymaking); *id.* at 1213–25 (Thomas, J., dissenting) (identifying "serious constitutional questions lurking beneath" the *Auer* doctrine); *id.* at 1210–11 (Alito, J., concurring in part and in the judgment) (noting that Justices Scalia and Thomas have offered "substantial reasons why the *Seminole Rock* doctrine may be incorrect"); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring) (noting "some interest in reconsidering" *Auer* deference); *id.* at 621 (Scalia, J., concurring in part and dissenting in part) (by making agencies both rule-drafter and rule-expositor, *Auer* "contravenes one of the great rules of separation of powers"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (observing that *Auer* gives agencies incentive to "maximiz[e] agency power" by "issu[ing] vague regulations" that are then re-interpreted with retroactive effect); Brett Kavanaugh, Keynote Address at the Center for the Administrative State Public Policy Conference: Rethinking Judicial Deference (June 2, 2016) ("I believe that Justice Scalia's dissent in [*Decker*] will become the law of the land.").

Lower courts have echoed these serious reservations over *Auer* deference. *See, e.g.*, *United States v. Havis*, 907 F.3d 439, 451-52 (6th Cir. 2018) (Thapar, J., concurring) (explaining that, in the criminal context "*Auer* not only threatens the separation of powers but also endangers fundamental legal precepts as well" and noting that *Auer* "deserve[s] renewed and much-needed scrutiny") (citations omitted); *Kisor v.*

Shulkin, 880 F.3d 1378, 1379 (Fed. Cir. 2018) (O'Malley, J., dissental) ("Whatever the logic behind continued adherence to the doctrine espoused in *Auer*—and I see little—there is no logic to its application to regulations promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated."); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring) ("The doctrine of deference deserves another look."); *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841 (7th Cir. 2015) (Easterbrook, J., concurring) (noting that "*Auer* may not be long for this world."); *Johnson v. McDonald*, 762 F.3d 1362, 1366–68 (Fed. Cir. 2014) (O'Malley, J., concurring) (suggesting that in an appropriate case the Supreme Court should revisit *Auer*); *Goodson v. OS Rest. Servs., LLC*, No. 5:17-cv-10-Oc-37PRL, 2017 U.S. Dist. LEXIS 71923, at *13 n.20 (M.D. Fla. 2017) (endorsing criticisms of *Auer*); *M.L. Johnson Family Props., LLC v. Jewell*, 237 F. Supp. 3d 528, 543–44 (E.D. Ky. 2017) (denying *Auer* deference in part due to separation of powers concerns); *State Case Prokop v. Lower Loup Nat. Res. Dist.*, 302 Neb. 10, 41–43 (2019) (Papik, J., concurring) (describing *Auer* as a "dubious proposition of federal law that itself may not stand the test of time.").

Amici endorse these criticisms and believe that they represent the kind of "special justification" that warrants a departure from precedent. *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

To be clear, this case is important because process matters. Those who hold the reins of political power will not always be benevolent, self-restrained public servants—and the procedural safeguards that seem frustrating and counterproductive in one instance may

very well be necessary bulwarks in another. *Auer* undermines these safeguards by concentrating lawmaking and law-interpretation in regulatory agencies, in a manner that both offends separation of powers principles and facilitates procedural shortcuts. Accordingly, *Auer* deference deprives regulated entities of fair notice, which is fundamental to the integrity of the law. Similarly, *Auer* deference robs administrative policymaking of legitimacy by allowing agencies to avoid public participation in the formulation of their rules.

And overturning *Auer* would not unduly burden either courts or agencies. Absent *Auer*, a court is not required to ignore agency expertise, and this Court has established nonbinding judicial respect for agency expertise as an alternative to *Auer*. Empirical studies have shown that these two approaches don't differ significantly with respect to administrative efficiency.

In sum, this Court's precedents, while deserving respect, are not immutable. *Stare decisis* "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (cleaned up). Where earlier decisions are badly reasoned or have proven unworkable, and altering the status quo isn't disruptive, "this Court has never felt constrained to follow precedent." *Smith v. Allwright*, 321 U.S. 649, 665 (1944). The Court accordingly should not hesitate to overturn *Auer* because of that doctrine's harm to principles of fair and inclusive legislation and regulation, and the minimal administrative burden from disrupting underlying precedent.

ARGUMENT

I. *AUER* CONTRAVENES WELL-ESTABLISHED ADMINISTRATIVE LAW NORMS

A. *Auer* Undermines the Separation of Powers and Due Process

Auer deference "contravenes one of the great rules of separation of powers [that he] who writes a law must not adjudge its violation." *Decker*, 568 U.S. at 621 (2013) (Scalia, J., concurring in part and dissenting in part). Affording controlling deference to agency interpretations of their own regulations gives executive agencies the power both to write the regulations they are charged with enforcing and later to declare just what the ambiguous words of those regulations say—a task traditionally left to courts. In effect, *Auer* deference allows for the concentration of legislative and judicial authority into the hands of relatively unaccountable administrative agencies. In this manner, the doctrine undermines the separation of powers at the center of our constitutional structure.

In addition to contravening separation of powers principles, *Auer* deference undermines fair notice to regulated parties by encouraging procedural shortcuts. Of course, "[f]air notice" of what the law requires is a "fundamental principle" of "our legal system." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). *See also* Lon L. Fuller, *The Morality of Law* 33–38 (1964) (arguing that lack of public promulgation and reasonable intelligibility are two of the "eight ways to fail to make law"). The Administrative Procedure Act incorporates this "fundamental principle" into agency policymaking by requiring agencies,

before they make a rule, to notify the public of the proposal, invite them to comment on its shortcomings, consider and respond to their arguments, and explain its final decision of the rule's basis and purpose. *See* 5 U.S.C. § 553(b)-(c). Through that process, those who will be subject to the interpretation are made aware of what agencies will require of them. Once an agency finalizes its interpretation, as when it promulgates a final rule, the regulated community is on notice of what the law requires and, furthermore, is assured that these requirements will not change without additional notice. See Jonathan H. Adler, *Auer Evasions*, 16 Geo. J.L. & Pub. Pol'y 1, 16 (2018) (explaining the interaction between APA procedures and principle of notice).

Auer deference violates this maxim by making it possible for administrative agencies to make changes to their regulations without abiding these procedural rules. As the dissenting justices in *Thomas Jefferson v. Shalala* warned, deferring to an agency's interpretation of its own ambiguous regulation gives agencies the opportunity to "transform by 'interpretation' what self-evidently are mere generalized [regulations]," and thereby deprive the regulated community of "adequate notice concerning the agency's understanding of the law." 512 U.S. at 519, 525 (Thomas, J., dissenting). *See also* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 669 (1996) (arguing that such deference "disserves the due process objectives of giving notice of the law to those who must comply with it and of constraining those who enforce it").

Under *Auer*, agencies can thus significantly affect regulated persons without even publishing regulatory changes, let alone allowing the public to participate

through notice-and-comment rulemaking. The doctrine allows "[a]ny government lawyer with a laptop [to] create a new federal crime by adding a footnote to a friend-of-the-court brief." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring). To appreciate how *Auer* deference vitiates procedural safeguards, consider the case after which the doctrine is named.

In *Auer*, the Labor Department set forth its regulatory interpretation in an *amicus* brief, decades after the rule's text had been promulgated. 519 U.S. at 457. Because the agency's interpretation was not offered until the litigation was well underway, the regulated parties could not have been afforded less notice or opportunity to lend input into a rule to which they were beholden. Nevertheless, the Court accepted the Labor Department's interpretation of its own regulation as if it were a disinterested party and accorded deference that imparted the force of law to that novel interpretation. *Id.* at 461.

B. *Auer*'s Distinct and Troubling Infirmities Stand Out in Comparison to *Chevron*

Auer deference is often treated as a close relative of deference to an agency's statutory interpretation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Indeed, the two doctrines share similarities in form. They are both controlling forms of judicial deference to agency constructions of ambiguous legal texts. And the policy justifications supporting *Chevron* deference—an agency's expertise and political accountability—apply with equal force to *Auer* deference. *Id.* at 847.

Notwithstanding the facial similarities between the two doctrines, they rest on distinct legal rationales, and the difference starkly demonstrates the aforementioned problems with *Auer* deference.

Chevron, the Court has repeatedly explained, is "rooted in a background presumption of congressional intent." *City of Arlington*, 569 U.S. at 296. The presumption is that, where Congress has delegated authority to an agency to administer a statute, Congress understands and assumes "that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996). As Chief Justice Roberts explained in *King v. Burwell*, *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." 135 S. Ct. 2480, 2488 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). *See also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

Neither *Auer* nor the precedent on which it relied, *Bowles v. Seminole Rock*, 325 U.S. 410 (1945), provides an equivalent foundation for deference to agency interpretations of their own regulations. To the contrary, *Auer* deference cannot be understood in terms of delegation. An agency that leaves an ambiguity in a promulgated regulation does not purposely cede control to another branch. Instead, it "cedes control" to itself. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring) (observing that although

Auer "seems to be a natural corollary—indeed, an *a fortiori* application—of the rule that we will defer to an agency's interpretation . . . it is not"). Moreover, no statutory provision—in the APA or elsewhere—suggests that Congress intended to bind courts to agency interpretations of their own regulations. Congress may have the authority to delegate such power to federal agencies, but it has not done so.

In practice, the doctrines' differences also highlight the inherent problems with administering *Auer* deference. Because *Chevron* is based on a theory of delegation, agencies are not entitled to receive deference unless the Court is satisfied that a delegation exists. As articulated in *United States v. Mead Corp.*, statutory ambiguity alone is an insufficient indication of congressional intent for agencies to exercise interpretive policymaking authority. 533 U.S. 218, 227–29 (2001). More is required. Specifically, courts must be able identify "circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Id.* at 229. Administrative process is central to that inquiry, such that *Chevron* is presumptively reserved for interpretations resulting from policymaking procedures like notice-and-comment rulemaking and adjudication.

Accordingly, if an agency wishes to obtain the benefits of *Chevron* deference, it must invest time and resources in developing and promulgating its interpretation. The agency must "pay now" by using agency resources to exercise delegated power to act with the force of law, or it will "pay later" when faced with more demanding judicial review. *See* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo.

Wash. L. Rev. 1449, 1464 (2011). As the Court has made clear, interpretations offered in opinion letters, guidance manuals, and amicus briefs are insufficient to warrant *Chevron* deference because they "lack the force of law," and Congress has not delegated agencies to bind the public in such instances. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

Auer, however, is not grounded in a theory of delegation, so it does not require courts to identify congressional intent for the agency to wield interpretative lawmaking authority. As a result, this Court will apply *Auer* deference to agencies' informal interpretations that do not carry the force of law. *See Christensen*, 529 U.S. at 587–88 (recognizing that *Auer* deference would be afforded to a mere opinion letter).

Far from being an academic matter, this distinction between the two doctrines demonstrates the practical problems with *Auer* deference. Under *Auer*, an agency can choose to avoid formal procedures that impart the force of law and instead issue an advisory interpretation of its own regulation in the form of a memo. If the agency wins controlling *Auer* deference in court, then necessarily its interpretation becomes binding on the public, even though the agency originally claimed that its memo was only advisory. *See Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring) ("Interpretive rules that command deference do have the force of law."). The absurd result is that avowedly non-binding interpretations gain binding effect through judicial review. In this manner, *Auer* deference gives agencies the perverse incentive to circumvent procedural safeguards. *See Decker*, 568 U.S. at 620 (Scalia, J., concurring in

part and dissenting in part) ("*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.").

By affording agencies the opportunity to undermine procedural safeguards, *Auer* also undermines the constitutional norms these safeguards were designed to protect, such as fair notice. A comparison to *Chevron* illustrates the point. As explained above, the Court presumptively reserves *Chevron* deference only to statutory interpretations resulting from administrative procedures that impart the force of law. *Chevron* thus discourages procedural shortcuts. Whatever its ills, *Chevron* simply does not present the same notice concerns that *Auer* does.

The contrast between two doctrines further distinguishes the separation of powers concerns associated with *Auer*. Under the *Chevron* framework, a court discharges its duty to say what the law is by first identifying a congressional intent to delegate interpretive authority to the agency. But there is no corresponding inquiry in the *Auer* framework, so *Auer* allows for the troubling concentration of lawmaking and law-expositing powers in regulatory agencies.

To be sure, *Chevron* deference is also a controversial doctrine that past and present members of the Court have scrutinized. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."); *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *City of Arlington*, 569 U.S. 290, 312 (Roberts, C.J., dissenting) (arguing that *Chevron* is inappropriate where an agency interprets

the scope of its own statutory authority); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1170–80 (10th Cir. 2015) (Gorsuch, J.) (questioning premises of *Chevron* deference). But regardless of one's views of *Chevron*, the doctrine is a model of jurisprudential salubrity compared with *Auer*.

C. Recent Legal Controversies Demonstrate *Auer* at Its Worst

This case is a typical example of how *Auer* deference subverts fair notice to regulated parties. At issue is the word "relevant" in procedural rules governing administrative adjudications before the Board of Veterans Appeals. *See* 38 C.F.R. § 3.156(c)(1). The panel below held that the regulation is not just ambiguous on its face, but that the apparent ambiguity is insoluble by resort to standard interpretive principles. *Kisor v. Shulkin*, 869 F.3d 1360, 1367–68 (Fed. Cir. 2017).

Quite sensibly, the petitioner Mr. Kisor takes "relevant" to have the same meaning as it does in the federal rules of evidence—as "any tendency to make a fact more or less probable" when the "fact is of consequence in determining the action." *See* Fed. R. Evid. 401(a)-(b). After all, "relevance" thus defined is a fundamental and well-known concept in civil procedure—and it is unclear why a more stringent definition would apply in an administrative adjudication.

In 2006, when the Department of Veterans Affairs promulgated amendments to its rules of procedure, it had the opportunity define or otherwise elaborate the term "relevant," but it failed to do so. *See* 71 Fed. Reg. 52455 (Sept. 6, 2006). Only on denying Mr. Kisor's claim did the Board announce its interpretation of this

ambiguous term. Plainly, the agency's method of interpretive policymaking offends principles of fair notice.

The Court was recently presented with another egregious example of how *Auer* deference encourages and facilitates the evasion of longstanding administrative law norms. *See Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016) (granting cert. on question of whether courts should extend deference to an unpublished agency letter), *vacated and remanded in light of new guidance*, 137 S. Ct. 1239 (2017). *Gloucester County* featured an abrupt change in longstanding agency and public understanding of what constitutes discrimination "on the basis of sex" under Title IX of the Education Amendments of 1972. *See* 20 U.S.C. § 1681; 34 C.F.R. § 106.33. Specifically, the Department of Education decided that this language should be applied to an individual's gender identity, as opposed to that individual's biological sex. *See G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016) (explaining regulatory background). Had the agency taken the usual step of proposing this change through notice-and-comment rulemaking, it would have been forced to explain the reasons for the change—and the resulting rule would have been eligible for *Chevron* deference. Instead, it declared its new interpretation in letters and informal guidance documents.

Whatever the merits of the interpretation the agency sought to adopt in *Gloucester County*, it put forward its interpretation in the least responsible and transparent fashion imaginable, and then sought binding deference to its interpretation in federal court. The agency's interpretation of Title IX neither went through notice-and-comment rulemaking nor was published before the agency sought deference. It was an

informal opinion written by a relatively low-level employee and was not considered binding on the agency itself. Yet under *Auer*, the Fourth Circuit gave this unpublished, non-binding letter from a minor bureaucrat the full force of a federal statute.

Following the Fourth Circuit's ruling, federal officials in the Department of Education and the Department of Justice issued a "Dear Colleague" letter to every Title IX recipient in the country, affirming and expanding on the context of the prior letter. *See* U.S. Dep't of Justice & U.S. Dep't of Educ., Opinion Letter on Transgender Students (May 13, 2016), https://bit.ly/2kQOcUa. Again, the agencies refused to undergo any sort of rulemaking.

To be clear, *amici* continue not to take a position on the question of statutory interpretation underlying *Gloucester County*. Instead, the crucial point is that by leveraging *Auer* to avoid participatory administrative procedures, agencies achieved a major shift in policy—redefining sex discrimination—while evading their obligation to engage with the regulated community and respond to critiques and comments on the proposed interpretation. Similarly, this procedural shortcut allowed agencies to evade the political accountability that results from openly and deliberately proposing an interpretive change of such magnitude.

II. OVERTURNING *AUER* WOULD NOT BURDEN COURTS OR AGENCIES

A. If the Court Overturned *Auer*, Agencies Would Retain *Skidmore* Deference

In practice, rejecting *Auer* deference wouldn't require courts to blind themselves to agency expertise.

In *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), for example, the Court didn't turn to *de novo* review after it denied binding *Auer* deference to a Labor Department regulatory interpretation due to insufficient notice. Instead, it granted the agency "a measure of deference proportional to the . . . power to persuade." *Id.* at 159 (cleaned up).

This alternative to *Auer* deference, known as *Skidmore* deference, is based on the recognition that "[t]he rulings, interpretations and opinions of [the agency], while not controlling upon the courts by reason of their authority, do constitute a body of evidence and informed judgement to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In determining the appropriate "weight" to accord the agency's interpretation, the court will consider "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.*

Unlike *Auer*, *Skidmore* is not controlling. Instead, courts look to the context of the agency's interpretation to determine its persuasive "weight." Whereas *Auer* is binary—either agencies get deference or they don't—*Skidmore* is akin to a spectrum of judicial respect between the poles of binding deference and *de novo* review. It is dynamic.

There is significant scholarship indicating that the *Skidmore* principle exerted a strong influence on this Court's original understanding of deference to an agency's regulatory interpretations. In granting deference to the executive agency, *Auer* relied on a 1945 decision, *Bowles v. Seminole Rock*, in which the Court

upheld the Office of Price Administration's interpretation of a price control regulation. *See* 325 U.S. at 414. Tellingly, the government's brief in *Seminole Rock* explicitly cited the *Skidmore* principle, which the Court had set forth only months before. *See* Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, Yale J. Reg.: Notice & Comment (Sept. 12, 2006), https://bit.ly/2Rdgx2c. Instead of establishing a novel deference doctrine, "[a] closer look at *Seminole Rock* suggests an unremarkable application of the less-deferential standard of review of *Skidmore v. Swift & Co.*" Jeffrey A. Pojanowski, Revisiting *Seminole Rock*, 16 Geo. J.L. & Pub. Pol'y 87, 88 (2018). Indeed, during the 1940s and 1950s, lower courts frequently connected *Seminole Rock* with the deference framework for an agency's interpretations under *Skidmore*. *See, e.g.*, Sanne H. Knudson & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47, 52 (2015).

To the extent these scholars are correct—and *Seminole Rock* is rooted in the non-binding *Skidmore* principle—*Auer* deviated from this Court's precedent by moving away from a *Skidmore* approach and towards a stronger form of deference. Ironically, it follows that overturning *Auer* would affirm *stare decisis* by returning the Court to its original understanding of judicial deference to agencies' regulatory interpretations.

B. Empirical Research Demonstrates the Insignificant Administrative Burden of Replacing *Auer* Deference with *Skidmore*

Like other principles of deference to agency policymaking, the *Auer* doctrine necessarily engenders some degree of administrative convenience. *See, e.g., Chris-*

topher, 567 U.S. at 159 n.17 (observing that *Auer* deference makes judicial review "easier" and also imparts "certainty and predictability to the administrative process"). Due to this nexus between *Auer* deference and administrative efficiency, some scholars have claimed that overturning *Auer* could lead to chaos in courts and agencies. *See, e.g.*, Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effect on Agency Rules*, 119 Colum. L. Rev. 1, 29 (2018) ("overturning *Auer* might throw the validity of countless existing interpretations, many of which have induced substantial reliance interests, into question"); Derek A. Woodman, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 Geo. Wash. L. Rev. 1721, 1736 (2014) (warning of the "disuniformity that could result if courts were to substitute the agency's interpretation of the regulation with their own").

Such criticisms far overstate the case. Far from roiling the practice of administrative law, the shift from *Auer* to *Skidmore* would represent a limited reform. According to a comparative study of the two doctrines before the federal courts of appeal, the government's textual interpretations currently prevail about 71 percent of the time under the *Auer* framework and about 60 percent under the *Skidmore* framework. *See* William Yeatman, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L. Rev. 515, 545 (2018).

From 1993 to 2013, the study estimates that replacing *Auer* with *Skidmore* deference would have resulted in merely 51 fewer agency regulatory interpretations surviving judicial review in the circuit courts, or about one interpretation per circuit court every five

years. *Id.* at 551. These results belie claims that disrupting the doctrine would lead to chaos in regulatory agencies and federal courts.

Over time, the effect would be even less disruptive, as agencies would remain free to adopt interpretations that would be eligible for *Chevron* in the interim. For example, the Department of Education reportedly plans to undergo a notice-and-comment rulemaking in lieu of the guidance document that had been at issue in *Gloucester County School Board*. *See* Erica L. Green, Katie Benner, & Robert Pear, *'Transgender' Could Be Defined Out of Existence under Trump Administration*, N.Y. Times, Oct. 21, 2018, at A1.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, and *Auer* overturned.

Respectfully submitted,

John J. Vecchione
CAUSE OF ACTION INSTITUTE
1875 Eye St., NW, Suite 800
Washington, D.C. 20006
(202) 499-2415
john.vecchione@causeofaction.org

Ilya Shapiro
Counsel of Record
Trevor Burrus
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

January 31, 2019

No. 18-15

In the

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

RIDDHI DASGUPTA
13330 Ridgewood Drive
Ellicott City, MD 21042
(703) 927-1148
RDasgupta@cantab.net

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional
Jurisprudence
c/o Chapman University
Dale E. Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Separation of Powers Is One of the Most Important Structural Features of the Constitutional Design to Protect Liberty. 3

II. *Seminole Rock* and *Auer* Deference Violate the Separation of Powers 7

III. *Auer* and *Seminole Rock* May be Overruled Consistent with Traditional *Stare Decisis* Principles. 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Agostini v. Felton,
521 U.S. 203 (1997) 16

Auer v. Robbins,
519 U.S. 452 (1997) ..... passim

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... passim

Buckley v. Valeo,
424 U.S. 1 (1976) 7

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 2, 10, 12, 14

Christensen v. Harris Cty.,
529 U.S. 576 (2000) 15

Christopher v. SmithKline Beecham,
567 U.S. 2156 (2012) 1, 15

Decatur v. Paulding,
39 U.S. 497 (1840) 15

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) 4, 14, 17

Dep't of Transp. v. Ass'n of Am. R.R.,
135 S. Ct. 1225 (2015) 1

FCC v. MCI Telecommunications Corp.,
439 U.S. 980 (1978) 9

Garco Const., Inc. v. Speer,
138 S.Ct. 1052 (2018) 1, 3

Gonzales v. Oregon,
546 U.S. 243 (2006) 15

INS v. Chadha,
462 U.S. 919 (1983).....6, 7, 16, 17

Janus v. Am. Federation of State, Cty., and Mun. Employees, Council 31,
138 S.Ct. 2448 (2018).....14, 15

Kilbourn v. Thompson,
103 U.S. 168 (1880).....7

Marbury v. Madison,
5 U.S. 137 (1803).....2, 8, 11, 12

Metro Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990).....9

Miller v. Johnson,
515 U.S. 900 (1995).....12, 15

Mistretta v. United States,
488 U.S. 361 (1989).....7, 8

Morrison v. Olson,
487 U.S. 654 (1988).....5, 9

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....11

National Cable & Telecommunications Ass'n v. Brand X Internet Services,
545 U.S. 967 (2005).....10

Pearson v. Callahan,
555 U.S. 223 (2009).....14

Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015).....1, 3, 4

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995).....3, 5, 10, 16

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 15

Springer v. Philippine Islands,
277 U.S. 189 (1928) 8

Talk America, Inc. v. Michigan Bell Tel. Co.,
564 U.S. 50 (2011) 4, 15

Turtle Island Restoration Network v. United States Dep't of Commerce,
878 F.3d 725 (9th Cir. 2017) 14

United States Telecom Ass'n v. FCC,
825 F.3d 674 (D.C. Cir. 2016) 11

United States v. Klein,
13 Wall. 128 (1872) 9

United States v. Nixon,
418 U.S. 683 (1974) 8, 12

United Student Aid Funds, Inc. v. Bible,
136 S.Ct. 1607 (2016) 3

Other Authorities

Adams, John, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (The Lawbook Exchange Ltd. 3rd ed., 2001) 7

Blackstone, William, COMMENTARIES ON THE LAWS OF ENGLAND (William S. Hein & Co. ed., 1992) 5, 12

Brutus, Essay XV (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed. 1981) 6

Hamilton, Alexander, Federalist 70, THE FEDERALIST PAPERS 10

Hamilton, Alexander, Federalist 9, THE FEDERALIST PAPERS.....5

Jefferson, Thomas, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS (Lester J. Cappon ed., 1959)..5

Locke, John, THE SECOND TREATISE ON GOVERNMENT (Thomas P. Peardon, ed.,1997).....5

Madison James, Federalist 47, THE FEDERALIST PAPERS.....2, 5

Madison, James, Federalist 48, THE FEDERALIST PAPERS.....6

Madison, James, Federalist 51, THE FEDERALIST PAPERS.....5, 7, 8, 12

Manning, John F., "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96 Colum. L. Rev. 612 (1996).....4, 8

Montesquieu, THE SPIRIT OF THE LAWS (Franz Neumann ed. & Thomas Nugent trans., 1949) 5

Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 294 (2014) 15

Rules

Sup. Ct. Rule 37.3(a) 1

Sup. Ct. Rule 37.6.....1

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental separation of powers principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing similar separation of powers issues, including *Garco Const., Inc. v. Speer*, 138 S.Ct. 1052 (2018) (cert. denied); *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); and *Christopher v. SmithKline Beecham*, 567 U.S. 2156 (2012).

SUMMARY OF ARGUMENT

This case asks whether the Constitution's text and structure, specifically its separation of powers principles, require or permit courts to defer to a federal administrative agency's interpretation of its own ambiguous regulations. In fact, that interpretive authority belongs primarily to the judiciary because "the preservation of liberty requires that the three great departments of power should be separate and distinct;" and because, concomitantly, the agencies' interpretation of their own regulations is a usurpation of the judicial

---

[1] Pursuant to this Court's Rule 37.3(a), this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

prerogative. James Madison, Federalist 47, THE FEDERALIST PAPERS 298 (Charles R. Kesler and Clinton Rossiter, eds., 2003).

The doctrine of deference to an agency's interpretation of its own regulations, first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and ossified in *Auer v. Robbins*, 519 U.S. 452 (1997), violates standard separation of powers principles. Those principles are derived from the three Vesting Clauses of the Constitution allocating the limited national government's powers to a Congress, a President, and a judiciary. Deferring to an agency's interpretation of its own regulations is no less indefensible than deferring to Congress about the meaning of statutes would be. It is also a recipe for post-hoc agency gamesmanship to ensure the regulator generally wins over the regulated, the governor over the governed. This is not the scheme of separated powers the Framers envisioned.

Furthermore, by misallocating judicial power and thus threatening individual liberty, *Auer* exacerbates the extant problem of delegation of lawmaking powers to unelected executive officials. That delegation already is at the constitutional breaking point under step two of the *Chevron* doctrine. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Auer* also deprives the judiciary of its constitutionally-ensconced and rightful authority to interpret the laws, an authority this Court has recognized for the past 215 years. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Several members of this Court have in recent years acknowledged the constitutional problems

with the *Auer* deference doctrine, and the doctrine should now be overruled.

ARGUMENT

I. Separation of Powers Is One of the Most Important Structural Features of the Constitutional Design to Protect Liberty.

Essential for the preservation of individual liberty, the Constitution's separation of powers is "a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (emphasis in original). It is "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of inter-branch conflict." *Id.*

Several members of this Court have recognized that various doctrines of deference to the unelected, unaccountable, and largely-unknown federal bureaucracy might be difficult to reconcile with the separation of powers' "high walls." *Id.* In particular, members of this Court believe that *Auer* deference is on its "last gasp." *Garco Const., Inc.*, 138 S.Ct. at 1053 (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *id.* at 1052 ("*Seminole Rock* deference is constitutionally suspect."); *United Student Aid Funds, Inc. v. Bible*, 136 S.Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari). Even *Auer's* author rejected the doctrine. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in judgment) (announcing that he would be "abandoning" the holding in *Auer* that he himself authored); *Decker v. Nw. Envtl. Def. Ctr.*, 568

U.S. 597, 620-21 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* is . . . a dangerous permission slip for the arrogation of power" (citing *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring)); John F. Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96 Colum. L. Rev. 612 (1996)); *see also Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in judgment) ("these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations"); *id.* at 1210-11 (Alito, J., concurring in part and concurring in judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect. . . . I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *Decker*, 133 S.Ct. at 1338 (Roberts, C.J., joined by Alito, J., concurring) ("It may be appropriate to reconsider that principle in an appropriate case").

There is good reason for this willingness to reconsider *Auer*. The rule announced in *Seminole Rock* and confirmed in *Auer* contravenes the separation of powers—a structural feature of the federal constitution considered vital by the Framers and Ratifiers—because it gives to the agencies the judiciary's prerogative of construing ambiguous regulations. *Auer* damages the judiciary, of course, but it also damages the Executive by setting up an inherent conflict between the President and the agencies. Ultimately, though, *Auer*'s denigration of the separation of powers injures the individual's liberty the most. In this respect, *Auer*'s sins are obvious, and no "careful and perceptive analysis" is required to observe the "important [and

adverse] change in the equilibrium of power" it effectuates. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). But even if *Auer*'s threat to individual liberty somehow had rendered it just a wolf "in sheep's clothing," *id.* (Scalia, J., dissenting), the separation of powers' "high walls and clear distinctions" would still require its demise, *Plaut*, 514 U.S. at 239.

Separation of the powers of government is foundational to our constitutional system precisely because the Framers and Ratifiers of the Constitution understood well that this principle was necessary to protect individual liberty. Accordingly, the founding generation relied on the works of Baron de Montesquieu, William Blackstone, and John Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government itself. James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra at* 318; James Madison, Federalist 47, THE FEDERALIST PAPERS, *supra at* 298-99; Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra at* 67; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, by

vesting the legislative authority in Congress, the executive power in the President, and the ultimate judicial responsibilities in this Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. Accepting as a given that power needed to be separated, the ratifying generation debated whether the proposed constitutional text separated power *enough*. James Madison, Federalist 48, THE FEDERALIST PAPERS, *supra* at 305. This was a rare issue on which the federalists and the anti-federalists agreed. Even the anti-federalist Brutus noted that "[when] power is lodged in the hands of men independent of the people, and of their representatives . . . no way is left to controul them." Brutus, Essay XV (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 442 (Herbert J. Storing ed. 1981). In short, the ratifying generation suffered from no agnosticism or crisis of confidence about the urgent imperative to diffuse power both horizontally (among the coordinate federal branches) and vertically (between the United States and the sovereign States).

Alarmed that just stopping one branch from exercising the powers of another would prove insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachments by another. James Madison, Federalist 48, THE FEDERALIST PAPERS, *supra* at 305. Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; James

Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380 (1989).

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. So much so that any attempt by any branch of government to encroach on another branch's powers, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The duty falls on the judicial branch, in particular, to enforce this essential protection of liberty. *Chadha*, 462 U.S. at 944-46. To be sure, the Constitution was designed to pit ambition against ambition and power against power. James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 319; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). But when this structural competition of interests does not stop an encroachment, this Court is obligated to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199. Judicial engagement at such critical moments is an imperative and a virtue, not a vice. It is a principal reason that the judiciary was created.

II. *Seminole Rock* and *Auer* Deference Violate the Separation of Powers.

The judiciary, like any other branch, must jealously guard its rightful authority so that structural protection of individual liberty flourishes. *See Springer v. Philippine Islands*, 277 U.S. 189, 201-02

(1928) ("the executive cannot exercise either legislative or judicial power."). The judiciary readily has done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). While each branch has its own constitutional duty to interpret and adhere to the Constitution, the judiciary cannot abdicate its own constitutional responsibility to interpret the law by giving dispositive deference to the interpretations of the other branches. *United States v. Nixon*, 418 U.S. 683, 704 (1974) ("[T]he judicial power . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers.").

The power to interpret regulations and to give authoritative effect to those interpretations is a judicial power. *Marbury*, 5 U.S. at 177. The deference shown under *Seminole Rock* and *Auer* abdicates the judiciary's constitutional responsibility of construing regulations to the agencies. Thus, this deference cedes judicial power to the Executive; and it invites the very concentration of power that the founding generation rejected. *See* Manning at 674-75; James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra at* 318-19 ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives, to resist encroachments of the others"). As Dean Manning has observed, *Seminole Rock*

deference also dilutes political constraints on agency action, allowing narrow interest groups to wield disproportionately large influence on the agency. *See* Manning at 675.

Additionally, *Auer* deference damages the Executive because it induces a President/agency schism, Article II's Vesting Clause notwithstanding. *See* Art. II, § 1, cl. 1 ("[t]he executive Power shall be vested in *a* President of the United States") (emphasis added); *see also Morrison v. Olson*, 487 U.S. 654, 698-99 (1989) (Scalia, J., dissenting) (analyzing historical sources); *United States v. Klein*, 13 Wall. 128, 147 (1872) (disfavoring even "inadvertent" encroachments of one branch on another's preserve). Often, the President has little, if any, control over the interpretation given to a regulation by an agency supposedly reposed within his branch and under his Article II authority. The President's and the agency's interpretive approaches and bottom-line views on what a legal instrument means might, and often do, clash. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 551 (1990) (contradictory briefs filed by the United States and the Federal Communications Commission (FCC) as to the constitutionality of the FCC's affirmative-action program); Petitioner FCC's Reply to "Brief for the United States in Opposition" at 1 n.1 (FCC brief in case construing an agency order chiding the Solicitor General and "questioning exactly what interests of the United States the Solicitor legitimately represents in this case."), *FCC v. MCI Telecommunications Corp.*, 439 U.S. 980 (1978) (cert. denied). *Auer* creates these fissures within the Executive Branch and threatens the President's traditional dominion over his own branch.

According to the Framers and Ratifiers of our Constitution, such an intra-Executive schism disrupts the Presidency's "unity," which "is conducive to [its] energy," and its structural integrity. Alexander Hamilton, Federalist 70, THE FEDERALIST PAPERS, *supra at* 422-23. Realizing some of the worst fears of the Framing generation, *Auer* deference has "destroyed" the Presidency's "unity" by splitting its power and "vesting" it "in two or more magistrates of equal dignity and authority." *Id.* at 423. No longer does the President get to enjoy the residual executive power that Article II vests *only* in that office. Instead, *Auer* has "[en]feeble[d]" the Presidency, a result that "implies a feeble execution of the government" itself—thus demoting it to the status of being "a bad government." *Id.* at 422. As a consequence, *Seminole Rock* and *Auer* have inflicted incalculable injury on both the judiciary and the Executive. To paraphrase Justice Scalia's opinion for the *Plaut* Court, weak fences make weak neighbors. 514 U.S. at 240.

To be sure, Congress might be able to delegate the task of filling in scientific and technical details in a regulatory scheme to an agency by "leaving a gap for the agency to fill" through a formal process of notice-and-comment rulemaking. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).[2] The purpose in doing this is to allow

---

[2] This should be distinguished from deferring to administrative diktats that the statutory text means one thing on one day, and something completely different on another day. *Compare National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 973 (2005) (upholding FCC determination that broadband internet providers were computer service providers rather than telecommunication providers under the Telecommunications Act of 1996) *with United States Telecom Ass'n v.*

an agency to exercise its unique expertise in the service of the policy adopted by Congress. Once the agency has "filled the gap" left by Congress through the formal rulemaking process, however, no deference should be shown to any subsequent interpretation (or reinterpretation) of those regulations. If an agency finds the need to reverse its policy or significantly alter its position, it has the power to do so. It only needs to promulgate a new rule, through the notice-and-comment process, explaining the reasons for its change. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009).

The ultimate power to interpret the meaning of a regulation—as a legal text—properly belongs to the judiciary, not the agency that promulgated that regulation. Of course, in applying a regulation, the agency must make some interpretation in practice. But that necessary executive function cannot exclude the judiciary from exercising its constitutional authority. Continuing to give controlling deference under *Auer* and *Seminole Rock* to agency interpretations transfers the judiciary's constitutional power to the Executive.

From the early days of the Republic, this Court has agreed that the courts have both the power and duty to interpret the law. *See Marbury*, 5 U.S. at 177. Later cases have relied on these principles to reject a

---

FCC, 825 F.3d 674, 695 (D.C. Cir. 2016), *cert. denied*, 139 S.Ct. 454 (2018) (upholding FCC's new ruling that broadband internet providers are now telecommunications providers rather than computer services providers—under the same statutory scheme).

call for deference to legal interpretations by the Department of Justice. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995). Each branch of government must support and defend the Constitution and thus must interpret the Constitution. The Courts may not, however, cede their judicial power to interpret the laws to the Executive. See *United States v. Nixon*, 418 U.S. at 704 (1974).

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. Federalist 51, *supra* at 269. This explains why this Court in *Marbury* did not simply declare legal interpretation to be a judicial power. Instead, the Court ruled that it was the duty of the judiciary to *exercise* that power. *Marbury*, 5 U.S. at 177. In order to keep the political branches in check, this Court may not surrender its power to interpret the law to either of the political branches. The failure to exercise this duty would be an invitation to "partiality and oppression." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Bk 1 § 2, at 58. The rule of controlling deference to agency interpretation of ambiguous regulations, however, is a surrender of judicial power and a decision to cede to the Executive the judicial power.

Chevron deference, when applied to an agency, using its specialized expertise, to merely fill a gap in the technical details of a regulatory scheme, does not raise the same concerns for separation of powers present here. Under this original purpose of *Chevron* deference, the Court does not cede its power to interpret the law. Instead, the Court recognizes that Congress gives agencies clear policy guidance and then relies on those agencies to employ their specialized expertise

(such as what level of exposure to a particular chemical is harmful) to fill in gaps in the legislative scheme. Until the agency has filled in those gaps in, the statute may not yet be complete in the sense that specialized expertise must be brought to bear on the problems that Congress sought to address. This use of agency expertise by Congress to fill in details in the regulatory scheme is not a part of the judicial function.

Once the agency has issued a regulation that carries the force of law, however, it then falls to the courts to interpret the regulation. In other words, it is the judiciary's job "to declare the sense of the law." Federalist 78, *supra* at 405.

Granting deference to the agency to interpret its own ambiguous regulation cedes the judicial function to the Executive. This is an invitation to agencies to avoid the expense and bother of rulemaking proceedings when it wants to change its policy. Instead of going through the process to allow public participation and judicial review of the change, it can instead merely change how it interprets its existing regulations.

Denying "controlling deference" to an agency interpretation does not mean that the courts must ignore long-standing agency interpretations and practices. Those remain important interpretative tools. Yet the ultimate job of interpreting the legal text will remain with the courts. To do otherwise results in a failure of the duty of the judicial branch of government "to declare the sense of the law" and thus violates the separation of powers required by the Constitution.

III. *Auer* and *Seminole Rock* May be Overruled Consistent with Traditional *Stare Decisis* Principles.

"*Stare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). For several reasons, *stare decisis* does not support retaining *Auer* and *Seminole Rock*.

First, these decisions were not well-reasoned and, as explained earlier, remain indefensible. *Seminole Rock*, Justice Scalia noted, "offered no justification whatever" for deferring to an agency's interpretation of its own regulation. *Decker*, 568 U.S. at 617-18 (Scalia, J., concurring in part and dissenting in part); *see also Janus v. Am. Federation of State, Cty., and Mun. Employees, Council 31*, 138 S.Ct. 2448, 2479 (2018) (considering the precedent's quality of reasoning in determining whether it should be retained). *Seminole Rock* and *Auer* deference has been the subject of special criticism by members of this Court and by lower court judges struggling to understand and apply the doctrine properly. *Pearson v. Callahan*, 555 U.S. 223, 234-35 (2009) (modifying the qualified-immunity inquiry for similar reasons); *see also Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in judgment) ("The problems [*Auer* and *Chevron*] create are serious and ought to be fixed."); *Turtle Island Restoration Network v. United States Dep't of Commerce*, 878 F.3d 725, 742 n.1 (9th Cir. 2017) (Callahan, J., dissenting in part) ("*Auer*'s continued vitality is a matter of considerable debate.").

Second, this Court's intervening decisions have removed or weakened *Auer*'s and *Seminole Rock*'s con-

ceptual underpinnings. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989). As an initial matter, this Court now gives primacy to the salient instrument's text and structure, which has not always been the case. *Miller*, 515 U.S. at 922-23. Therefore, the agencies' views on what their regulations mean has diminished value to the Court. Moreover, this Court has abrogated *Auer*'s predicates and rendered what remains of the original deference a problematic anomaly. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012) (holding that *Auer* is inapplicable to an agency's "interpretation of ambiguous regulations [that would] impose potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation was announced"); *Talk America*, 564 U.S. at 63-64 (indicating that *Auer* proscribes agencies from issuing what effectively amounts to a new regulation); *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* is applicable where the regulation simply paraphrases the statute); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (holding that *Auer* is inapplicable where the agency's regulation is unambiguous).

Moreover, *Auer* and *Seminole Rock* themselves are relatively recent aberrations in the historical trajectory of judicial deference. *See, e.g., Decatur v. Paulding*, 39 U.S. 497, 515 (1840) (Marshall, C.J.); Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 294 (2014) (stating that the early Supreme Court's "lack of deference" to the Executive meant that "[t]he judges had to defer to the law, not the Executive's interpretation"). Erasing these anomalies will enhance the interests of continuity and stability in the law and thus the interests of *stare decisis* itself. *See Janus*, 138

S.Ct. at 2483-84. Otherwise, *stare decisis* would become an empty talisman reflexively attached to the latest authoritative judicial pronouncement, a canon decoupled from the very interests it is supposed to advance.

Third, a precedent receives weak *stare decisis* effect when: It is a constitutional (instead of statutory) case, *see Agostini v. Felton*, 521 U.S. 203, 235 (1997); it addresses the evidentiary and procedural rules facing stakeholders, not their primary conduct engendering reliance and expectancy, *see Pearson*, 555 U.S. at 233-34; *Payne*, 501 U.S. at 828; or it is just an interpretive tool, *see Pearson*, 555 U.S. at 233-34. Because *Seminole Rock* and *Auer* deference is a constitutional matter involving the separation of powers, does "not affect the way in which parties order their affairs," and is only a tool of judicial construction, it is not entitled to *stare decisis* effect. *Id.*

Fourth, this Court most vigilantly enforces the Constitution's structural protections, including by invalidating long-standing unconstitutional practices, *see Chadha*, 462 U.S. at 959, or of recent vintage, *see Plaut*, 514 U.S. at 240; *United States v. Lopez*, 514 U.S. 549, 551, 567-68 (1995). Otherwise our entire constitutional structure would unravel. The Court should so enforce again here.

The most illustrative example of judicial engagement to enforce our separation of powers is *Chadha*, where this Court struck down the legislative veto. 462 U.S. at 959. Despite the fact that more than 200 statutes across a wide array of policy areas over at least five decades had deployed this practice, the Court held that the practice violated the Constitution's structural requirements of bicameralism and presentment.

Chadha, 462 U.S. at 967-68 (White, J., dissenting). The Court rejected those concerns. Notwithstanding the "cumbersomeness and delays" inherent in a system of separated powers, there is no better way to preserve freedom. *Id.* at 959. The alterations on which the *Chadha* Court insisted in response to the Constitution's structural fortifications were necessary and worthwhile.

The structural mischief *Auer* deference induces is similar, in many respects, to the shortcut the *Chadha* Court ended. In both cases, the enforcement by this Court of the structural provisions contained in the Constitution was essential because the character of our entire federal government and the preservation of core individual liberty are imperiled when the powers are hopelessly commingled. Accordingly, this Court should restore its coordinate branches to their proper preserves by jettisoning *Seminole Rock* and *Auer* deference.

CONCLUSION

Several members of this Court have already acknowledged the significant separation of powers problems that result from the increasingly broad reliance on deference doctrines by the unaccountable, unelected, and unchecked administrative bureaucracy. As the Chief Justice noted, the issue of *Auer* deference "is a basic one going to the heart of Administrative Law." *Decker*, 568 U.S. at 1339 (Roberts, C.J., concurring). The Court has granted certiorari to resolve that very issue. Now the Court can and should restore the separation of powers principles that lie at the heart of our constitutional system of government.

For the reasons stated in this brief and by petitioner, this Court should overrule *Seminole Rock* and *Auer* and reverse the Federal Circuit's judgment.

January 2019

Respectfully submitted,

RIDDHI DASGUPTA
13330 Ridgewood Drive
Ellicott City, MD 21042
(703) 927-1148
rdasgupta@cantab.net

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

RAE T. VANN
MICHAEL P. BRACKEN
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
mbracken@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Center for Workplace Compliance

January 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. *AUER* DEFERENCE UNREASONABLY INTERFERES WITH EMPLOYERS' ABILITY TO COMPLY WITH ALREADY-COMPLEX REGULATORY OBLIGATIONS	6
A. *Auer* And *Seminole Rock* Undermine The Value Of Notice-And-Comment Rulemaking	6
B. Fulsome Judicial Review Of Agency Policy Interpretations Provides A Much Needed Check On The Administrative State	9
II. AGENCIES TOO OFTEN ABUSE DEFERENCE ACCORDED THEM UNDER *AUER*	10
CONCLUSION	17

TABLE OF AUTHORITIES

FEDERAL CASES Page(s)

Auer v. Robbins, 519 U.S. 452 (1997) .....*passim*

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).....*passim*

Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012).....*passim*

City of Arlington, Tex. v. FCC, 569 U.S. 290 (2013)..... 5

Columbia Gas Transmission, LLC v. 1.01 Acres, 768 F.3d 300 (3d Cir. 2014) 16

Decker v. Northwest Environmental Defense Center, 568 U.S. 597 (2013)..... 5, 11, 15

Edelman v. Lynchburg College, 535 U.S. 106 (2002)..... 2

Federal Express Corp. v. Holowecki, 552 U.S. 389 (2008)..... 2

In re Novartis Wage and Hour Litigation, 611 F.3d 141 (2d Cir. 2010), *abrogated by Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012)..... 11, 16

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007)..... 10

Marbury v. Madison, 5 U.S. 137 (1803)..... 9

Marsh v. J. Alexander's LLC, 869 F.3d 1108 (9th Cir. 2017), *rev'd en banc*, 905 F.3d 610 (9th Cir. 2018)..... 12, 13

Morriss v. BNSF Railway Co., 817 F.3d 1104 (8th Cir. 2016)..... 14, 15

TABLE OF AUTHORITIES—Continued

Page(s)

Perez v. Mortgage Bankers Association, 135 S. Ct. 1199 (2015) 8, 15

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 16, 17

Talk America, Inc. v. Michigan Bell Telephone Co., 564 U.S. 50 (2011) 5, 7, 9, 16

United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607 (2016) 16

Young v. United Parcel Service, Inc., 135 S. Ct. 1338 (2015) 15

FEDERAL STATUTES

Administrative Procedure Act, 5 U.S.C. § 706 ..... 4, 5, 8, 9

Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* 7

Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* 7, 11, 12, 14

29 U.S.C. § 216(b) 14

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* 7

FEDERAL REGULATIONS

29 C.F.R. § 531.56(e) 13

29 C.F.R. § 1630.2(h)(1) 14

29 C.F.R. app. § 1630.2(h) 14

38 C.F.R. § 3.156(c) 3

38 C.F.R. § 3.156(c)(1) 3, 4

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page(s)

EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 2014) 15

U.S. Department of Labor, Wage & Hour Division, Field Operations Handbook § 30d00(f) (2016) 13

IN THE

Supreme Court of the United States

No. 18-15

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

The Center for Workplace Compliance respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of employment-related laws and regulations.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency that CWC represents. The question whether this Court's holdings in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), should be overruled will have substantial legal and practical impacts on all employers subject to federal agency regulation.

CWC has participated in a number of cases involving deference to agency interpretations of regulations and statutes. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012); *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008); and *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of

the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner James Kisor is a Vietnam-War veteran who applied to the Department of Veterans Affairs (VA) for disability benefits in December 1982 for his service-related post-traumatic stress disorder (PTSD). Pet. App. 2a. After receiving conflicting reports on Kisor's diagnosis, the VA denied his application for disability benefits. Pet. App. 3a.

On June 5, 2006, Kisor re-applied for disability benefits on the basis of PTSD. Pet. App. 4a. Based on the materials presented in connection with the re-application, the VA this time agreed that Kisor suffered from service-related PTSD and assigned an effective date for his benefits eligibility as June 5, 2006. *Id.*

Kisor appealed this determination to the Board of Veterans' Appeals (Board), arguing that pursuant to 38 C.F.R. § 3.156(c) of the VA's regulations, his eligibility for benefits should be retroactive to December 1982 when he initially applied. Pet. App. 6a. Section 3.156(c)(1) provides that the VA will "reconsider" a claim if it "receives ... *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim ...." Pet. App. 7a (emphasis added). The Board denied Kisor's request for retroactive benefits on the ground that he failed to present "relevant" records as required by 38 C.F.R. § 3.156(c)(1) because none of the records demonstrated that the VA erred in 1983 when it found that he did not suffer from PTSD. Pet. App. 8a.

Kisor appealed the Board's adverse ruling to the U.S. Court of Appeals for Veterans Claims, and losing there, Pet. App. 9a, further appealed to the U.S. Court of Appeals for the Federal Circuit, arguing that the VA's interpretation of what constitutes "relevant" records under 38 C.F.R. § 3.156(c)(1) was erroneous. Pet. App. 10a. On appeal, the Federal Circuit affirmed the Board's denial of retroactive benefits. Pet. App. 19a. The court found that § 3.156(c)(1) was ambiguous as to the meaning of the term "relevant" and applying *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), it deferred to the VA's interpretation of the regulation. Pet. App. 14a-19a.

Kisor filed a petition for a writ of certiorari, which this Court granted on December 10, 2018. *Kisor v. Wilkie*, 2018 WL 6439837 (Dec. 10, 2018).

SUMMARY OF ARGUMENT

Auer deference undercuts the rule of law by thwarting a regulated entity's right to fair notice and certainty about what it must do to comply with the multitude of complex federal laws and regulations that apply to it. This is especially true of U.S. employers who are subject to myriad workplace rules enforced by multiple federal agencies. For decades, federal courts have relied on the Court's rulings in *Seminole* and *Auer* to justify giving controlling weight to an agency's interpretation of its own ambiguous regulation, even when set forth in an informal pronouncement, such as an *amicus* brief.

Under the U.S. Constitution and the Administrative Procedure Act (APA), however, it is the responsibility of the federal judiciary to interpret federal law. *Auer* interferes with that duty. It emboldens an already

powerful and increasingly politicized administrative state, making it more difficult for the courts to "police the boundary between the Legislative and the Executive ...." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting). In addition, *Auer* deference deprives employers of advance notice of an agency's change in position, thus denying companies the due process protections afforded by the APA. As a practical matter, *Auer* dissuades courts from engaging in any meaningful review of the reasonableness of an agency's interpretation, resulting in a judicially-sanctioned end-run around the APA-mandated notice-and-comment rulemaking process and thus allowing agencies to legislate by administrative whim. Accordingly, *Auer* deference to agency policy interpretations of its own regulations not only undermines the critical purpose of notice-and-comment rulemaking, but also encourages regulators to promulgate intentionally vague rules armed with the knowledge that they will be accorded significant leeway – indeed, controlling deference – in future interpretations beyond the scope of public input and scrutiny.

The application of *Auer* deference as a device for resolving disputes over ambiguous regulations has implications for every employer that is subject to workplace compliance regulations. Under the current standard, controlling deference is accorded even to novel agency positions or those that do not represent the best interpretation of the regulation at issue. *See Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013) (applying *Auer* deference and ruling that "an agency's interpretation need not be the only possible reading . . . —or even the best one—to prevail"); *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 64 (2011)

("novelty alone is not a reason to refuse deference" to an agency explanation of its own ambiguous rule).

Agencies take advantage of *Auer* by pronouncing new interpretations of their own regulations, often in *amicus* briefs, knowing that such explanations are likely to be afforded controlling deference. There are countless examples of agencies like the DOL and the EEOC pressing breathtakingly broad, informal regulatory interpretations and when challenged, arguing for, in effect, unquestioned deference under *Auer*. *See infra*, Section II.

Auer makes it more unlikely for courts to delve into the reasonableness of an agency's interpretation, which greatly impacts posturing when a dispute arises over an ambiguous rule. Agencies are willing to take a harder pre-litigation stance, and employers are less willing to challenge even wildly overbroad agency positions, knowing that chances are good the agency, invoking *Auer*, will likely prevail.

ARGUMENT

I. *AUER* DEFERENCE UNREASONABLY INTERFERES WITH EMPLOYERS' ABILITY TO COMPLY WITH ALREADY-COMPLEX REGULATORY OBLIGATIONS

A. *Auer* And *Seminole Rock* Undermine The Value Of Notice-And-Comment Rulemaking

Auer deference undercuts the rule of law and harms responsible employers by, among other things, eliminating the regulatory certainty and reliability that flows from notice-and-comment rulemaking. Bound by this precedent, courts across the country default to the position that an agency's interpretation of its own

ambiguous regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414. Employers already face numerous challenges in attempting to comply with the many complex laws and regulatory schemes that govern their actions, including rules implementing the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, to name but a few. From an employer's perspective, it is imperative that a company be able to rely upon the text of a regulation, without fear that with every change in administration, the promulgating agency will seek to effectuate a change in position simply by issuing a new "informal" policy document or inserting itself into litigation as an *amicus curiae*.

Auer deference encourages federal agencies to draft ambiguous rules during the notice-and-comment period, while at the same time discouraging them from correcting existing, ambiguous rules. Both outcomes present damaging implications for notice-and-comment rulemaking and allow policy shifts, through informal avenues, that an agency otherwise would be unwilling or unable to advance through formal notice-and-comment rulemaking. Thus, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk America*, 564 U.S. at 69 (Scalia, J., concurring).

The *Auer* doctrine allows agencies to significantly alter employers' compliance obligations simply by announcing a change in enforcement philosophy

either through a policy document or an *amicus curiae* brief filed with any one of the nation's more than 100 federal district and circuit courts. It discourages agency transparency and encourages abuse by removing the important notice-and-comment procedures required by the APA.

Notice-and-comment rulemaking allows employers to provide critical insight into proposed rules on real-world issues that a regulator might otherwise overlook. By allowing agencies to promulgate guidance outside of notice-and-comment rulemaking, that then effectively is treated as controlling, *Auer* deprives employers of the ability to provide meaningful input into the rules that govern them. It also blurs the line between legislative and interpretive rules, which this Court has said carry different legal weight. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211-12 (2015) (Scalia, J., concurring) ("By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them").

In short, *Auer* deference changes the field of employment regulations from complex to unfair for employers that are trying earnestly to play by the rules. Regulated entities need the best and most reasoned guidance possible. By shirking the vital notice-and-comment rulemaking process, *Auer* inserts uncertainty and inconsistency into an employer's ability to reasonably interpret employment regulations and avoid unfair surprise.

B. Fulsome Judicial Review Of Agency Policy Interpretations Provides A Much Needed Check On The Administrative State

Rather than making employers subject to the whims of a questionably-motivated regulator, a neutral court should decide what a regulation means, using the same tools that are at the disposal of a private party who is trying to comply with the regulation. This rule is not only sensible and in line with constitutional separation of powers principles, but also is mandated by the APA, which requires "the reviewing court [to] determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Neutral courts are in the best position to decide how an ambiguous regulation, as written, and considering all permissible additional materials, should reasonably interpreted by a regulated employer. Unlike the DOL and the EEOC, federal judges have little incentive to mold existing rules to fit any given Administration's often ephemeral policy goals. A court is in as good or better a position as the agency to interpret the text of a regulation that carries the force of law, and under the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

While it may seem intuitive to defer, at least in some sense, to an agency's interpretation of its regulations, according "controlling" deference to regulatory interpretations expressed through informal means tramples on the "fundamental principles of separation of powers," leaving the agency—or, more properly, the agency's drafting attorney—with both legislative and executive powers. *Talk America*, 564 U.S. at 68 (Scalia, J., concurring).

It is also important to recognize that while a few employers may be willing to incur the significant expense of fighting an agency on the questionable interpretation of its own regulation, most employers will not take that risk, knowing that most courts reflexively will defer to an agency's explanation, without delving into the reasonableness of that explanation. At the same time, *Auer* emboldens agencies to take harder pre-litigation stances on questionable regulatory explanations. As a result, employers are left settling enforcement actions for large sums or expending substantial resources to comply with a wrong-headed interpretation of an ambiguous regulation.

Auer deference also encourages the DOL and other federal agencies to act as regulatory "watchdogs," often appearing as *amicus curiae* in cases solely to advance their novel interpretation of inherently and intentionally ambiguous regulations, without the consideration or benefit of public notice and comment. *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (applying *Auer* to an agency interpretation that was inconsistent with a previous interpretation of the same regulation and that changed during pending litigation to support a litigant who lost in trial court). To the extent that *Auer* has enabled such behavior, it serves no legitimate purpose and should be overruled.

II. AGENCIES TOO OFTEN ABUSE DEFERENCE ACCORDED THEM UNDER *AUER*

Federal agencies like the DOL of course are entitled to express their opinions through informal means such as policy documents and *amicus* briefs, but those opinions cannot and should not be given "controlling" deference merely because they are not "plainly

erroneous or inconsistent." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154-55 (2012). Under *Auer*, however, an agency's rationalization "need not be the only possible reading . . . —or even the best one—to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013). Agencies regularly take advantage by imploring courts to not worry themselves with the proper interpretation of a rule in the name of *Auer*.

In *In re Novartis Wage and Hour Litigation*, for instance, the Second Circuit held that pharmaceutical sales representatives (PSRs) were considered nonexempt from overtime pay under the FLSA's "outside salesmen" exemption. 611 F.3d 141, 153-55 (2d Cir. 2010), *abrogated by Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). For decades, PSRs were considered to fall within this exemption, and the DOL had done nothing to challenge their exempt status. Then in 2009, the DOL filed an *amicus* brief with the Second Circuit in which it argued, for the first time, that under its FLSA regulations, PSRs fell outside of the law's exemption and thus were entitled to overtime pay. *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2010) (Brief for the Secretary of Labor as *Amicus Curiae* (Oct. 13, 2009)). The Second Circuit, citing to *Auer*, deferred to the DOL's novel interpretation and ruled against the employer. *Id.* at 153-55.

Two years later, this Court, ruling in a different case on that same issue, held that the DOL's position was not entitled to any deference because nothing in the plain text of the FLSA or the DOL's implementing regulations provided "clear notice" to employers that PSRs were nonexempt. *SmithKline*, 567 U.S. at 157. Furthermore, despite the industry's decades-long

practice of classifying PSRs as exempt, the DOL never initiated any enforcement actions or otherwise suggested that it thought the industry was acting unlawfully. *Id.*

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Id. at 158-59.

After determining that DOL's new interpretation was not entitled to any deference, the Court then conducted its own analysis of the text of the FLSA and the implementing regulations to determine whether PSRs are exempt. The Court answered in the affirmative, vindicating the employers' attempted reliance on the best reading of the pertinent regulation.

Another example of *Auer*'s harmful impact on employers is demonstrated by *Marsh v. J. Alexander's LLC*, 869 F.3d 1108 (9th Cir. 2017), *rev'd en banc*, 905 F.3d 610 (9th Cir. 2018), which addressed whether an employer can take a "tip credit" towards the minimum wage calculation for an employee that works for tips but also performs other related non-tip functions. The DOL's regulation clarifies that while a "tip credit" can only be taken for wages earned in connection with hours worked in a tipped job, where a tipped employee has separate but related non-tip duties, such as a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses, the employer

can claim the tip credit for all wages earned. 29 C.F.R. § 531.56(e).

The DOL purported to further "interpret" this "related duties" rule in a Field Operations Handbook, which provided that it would treat individuals "effectively employed in dual jobs" the same as individuals actually employed in dual jobs. U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(f) (2016) ("Handbook"). The Handbook clarified that any employee who worked "in excess of 20 percent of the hours worked in the tipped occupation in the workweek" doing tasks besides working directly for tips (*e.g.*, "washing dishes or glasses as opposed to waiting on customers") would be considered "effectively employed in dual jobs," *id.*, meaning that the employer would have to pay the regular minimum wage for that time, without being able to discount the employee's tips earned during that time. This "80/20 rule" found in the Handbook was directly at odds with the DOL's own regulation, which included a similar waitress example for when related duties would not be considered a separate job.

In *Marsh v. J. Alexander's LLC*, a three-judge panel of the Ninth Circuit ruled that the employer had properly relied on the regulation when it applied the tip credit to wages earned in connection with related non-tipped jobs performed by tipped employees. 869 F.3d 1108 (9th Cir. 2017). However, the full court sitting *en banc* reversed, holding that *Auer* required deference to the DOL's informal Handbook interpretation of the tip credit regulation. *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018) (*en banc*).

This ruling demonstrates how *Auer* deference makes it incredibly difficult for employers to comply

with any number of complex regulations. Here, the most reasonable reading of the regulation did not control because the *en banc* court, rather than interpreting the text for itself, deferred to the agency's reading, even when it was not the best one. Under the FLSA, the harm caused by *Auer* to employers is even greater because a violation of the minimum wage rule can result in liability not only for "unpaid minimum wages, [but also for] an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

The DOL is not alone in attempting to press novel interpretations of its own regulations in the name of *Auer*. In *Morriss v. BNSF Railway Co.*, for instance, the EEOC filed an *amicus* brief contending that "an individual is not required to show an underlying physiological cause to establish the impairment of morbid obesity." 817 F.3d 1104 (8th Cir. 2016) (Brief of U.S. Equal Employment Opportunity Commission as *Amicus Curiae* on Behalf of Appellant Melvin Morriss in Support of Reversal, at 13). The agency argued that this interpretation was entitled to controlling deference under *Auer*, despite the fact that the EEOC's regulations implementing the ADA define the term "[p]hysical or mental impairment" as "[a]ny *physiological* disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems." 29 C.F.R. § 1630.2(h)(1) (emphasis added). The agency further explains in its ADA Interpretive Guidance that impairment "does not include physical characteristics such as eye color, hair color, left-handedness, or height, *weight*, or muscle tone that are within 'normal' range and are not the result of a physiological disorder." 29 C.F.R. app. § 1630.2(h) (emphasis added). The Eighth Circuit fortunately recognized that this new interpretation was unsupported by the EEOC's regulation and its own sub-

regulatory enforcement guidance, refusing to defer to the agency's interpretation. *Morriss*, 817 F.3d at 1108-09.

Another egregious example of agency overreach through informal guidance is found in the EEOC's attempt in 2014 to revise its pregnancy accommodation subregulatory enforcement guidance to impose an affirmative obligation on employers to provide pregnancy-related workplace accommodations to the same extent as are provided to non-pregnant workers "similar in their ability or inability to work." EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues*, at I.A.5 (July 2014). However, such an interpretation was inconsistent with the agency's regulation and longstanding policy interpretations, which did not impose an affirmative obligation on employers to provide workplace accommodations to those who, due to ordinary pregnancy (as opposed to a pregnancy-related disability), are unable to perform the essential functions of their jobs. Before this Court, the Solicitor General, joined by the EEOC, argued, albeit unsuccessfully, that the guidance should be given "special, if not controlling, weight." *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1351 (2015).

In the past few years, members of this Court have recognized the abuses that result from application of *Auer* deference. *See, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring) ("*Seminole Rock* was constitutionally suspect from the start, and this Court's repeated extensions of it have only magnified the effects and the attendant concerns"); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer* deference] in an appropriate case"); *SmithKline*, 567 U.S. at 158 ("Our practice of deferring

to an agency's interpretation of its own ambiguous regulations ... creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit ....") (citation omitted); *Talk America*, 564 U.S. at 68 (Scalia, J., concurring) (*Auer* deference is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well").

The Court has made efforts to rein in the "unfair surprise" problem that naturally flows from this doctrine, *see, e.g., SmithKline*, 567 U.S. at 155-57, but courts continue to defer to agency interpretations without due consideration of the reasonableness of the explanation. *See, e.g., Novartis*, 611 F.3d at 153-55 (court deferred to DOL's interpretation of FLSA even though it was unsupported by implementing regulations and agency's course of conduct); *see also Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 316-17 (3d Cir. 2014) (Jordan, J., dissenting) (criticizing majority for deferring to an agency interpretation that was at odds with regulatory language and was adopted in a footnote to "an unrelated rulemaking ... in reaction to the District Court's decision in [that] case"); *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (the case is "emblematic of the failings of *Seminole Rock* deference").

If any deference is to be given to an agency's interpretation of its own ambiguous regulation, a standard akin to that found in *Skidmore v. Swift & Co.*, is more appropriate. Under *Skidmore*, whether deference to an agency interpretation is warranted depends on "the

thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U.S. 134, 140 (1944).

CONCLUSION

For the reasons set forth above, the *amicus curiae* Center for Workplace Compliance respectfully submits that the Court should overrule *Auer* and *Seminole Rock*, and that the decision below should be reversed.

Respectfully submitted,

RAE T. VANN
MICHAEL P. BRACKEN
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
mbracken@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace
Compliance

January 2019

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETER \NS AFFAIRS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H. St. NW
Washington, DC 20062
(202) 463-5337

Kathryn E. Cahoy
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square
Palo Alto, CA 94306
(650) 632-4735

Mark W. Mosier
Counsel of Record
Kevin F. King
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
mmosier@cov.com
(202) 662-6000

Counsel for the Chamber of Commerce of the United States of America

(Additional counsel listed on inside cover)

Liz Dougherty
BUSINESS ROUNDTABLE
300 New Jersey Ave., N.W.
Washington, DC 20001
(202) 872-1260

Counsel for Business Roundtable

Kathryn Kirmayer
Daniel Saphire
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street SW
Suite 1000
Washington, DC 20024
(202) 639-2508

Counsel for Association of American Railroads

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. *Auer* Deference Increases Regulatory Uncertainty 5

II. *Auer* Deference In Action: A Litany of "Greatest Misses." 8

III. *Seminole Rock* And *Auer* Should Be Overruled 14

A. *Auer* and *Seminole Rock* Violate Separation-Of-Powers Principles 14

B. *Auer* and *Seminole Rock* Are Contrary To The APA 16

C. *Auer* and *Seminole Rock* Cannot Be Justified On Policy Grounds 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins, 519 U.S. 452 (1997) ..... *passim*

Bigelow v. Dep't of Defense,
217 F.3d 875 (D.C. Cir. 2000) 10

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Chase Bank USA, N.A. v. McCoy,
562 U.S. 195 (2011) 7

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 6, 8

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 5

Cope v. Let's Eat Out, Inc., — F. Supp. 3d —,
2019 WL 79367 (W.D. Mo. Jan. 2, 2019) 9

E.I. Du Pont De Nemours & Co. v. Smiley,
138 S. Ct. 2563 (2018) 7

F.C.C. v. Fox Television Stations, Inc.,
567 U.S. 239 (2012) 5

Garco Constr., Inc. v. Spear,
138 S. Ct. 1052 (2018) 12, 15

Grayned v. City of Rockford,
408 U.S. 104 (1972) 8

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016) 7, 8, 14

Kentuckians for Commonwealth Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 10

M.R. v. Dreyfus, 697 F.3d 706 (9th Cir. 2012) 13

Marsh v. J. Alexander's LLC,
905 F.3d 610 (9th Cir. 2018) 7, 8, 9

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991) 19

Montejo v. Louisiana, 556 U.S. 778 (2009) 18

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 7

Pearson v. Callahan, 555 U.S. 223 (2009) 15

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015) ..... *passim*

Pub. Citizen v. U.S. Dep't of Justice,
491 U.S. 440 (1989) 19

San Diego Gas & Electric Co. v. FERC,
— F.3d —, 2019 WL 190306
(D.C. Cir. Jan. 15, 2019) 11, 12

Shalala v. Guernsey Memorial Hospital,
514 U.S. 87 (1995) 12

Talk America, Inc. v. Mich. Bell Tel. Co.,
564 U.S. 50 (2011) 6, 14

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 6

United Student Aid Funds, Inc. v. Bible,
136 S. Ct. 1607 (2016) 8, 13

Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.,
550 U.S. 81 (2007) 19

Statutes & Regulation

5 U.S.C. § 551 16

5 U.S.C. § 553 ..... 5, 17

5 U.S.C. § 706 ..... 4, 16, 17

38 U.S.C. § 501 5

38 U.S.C. § 502 16

38 U.S.C. § 7261 16

38 U.S.C. § 7292 16

18 C.F.R. § 35.35 11

Other Authorities

About Hiring Our Heroes,
https://www.hiringourheroes.org/about-hiring-our-heroes/ (last visited
January 29, 2019) 2

Brief for Respondent Federal Energy Regulatory Commission, *San Diego Gas & Electric Co. v. FERC*, No. 16-1433, at 2 (D.C. Cir. filed Sept. 15, 2017) 11

Allyson N. Ho, *Why Seminole Rock Should Be Overruled*, 36 Yale J. on Reg.: Notice & Comment (Sept. 19, 2006), http://yalejreg.com/nc/2039-2/ 18

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 637 (1996) 15, 17

U.S. Dep't of Labor, Opinion Letter FLSA2018-27 (Nov. 8, 2018), https://www.dol.gov/whd/opinion/FLSA/2018/2018_11_08_27_FLSA.pdf 9

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the U.S. Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of concern to the business community.

The business community has a particular interest in the interpretive principles applied to federal regulations. Given the breadth of federal regulations, virtually every business in America, large or small, has at least some portion of its work regulated by federal agencies. These businesses have a strong interest in the proper interpretation of agency regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The U.S. Chamber also has an interest in this case because it involves a veteran who was wrongly denied disability benefits. The U.S. Chamber actively sup-

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties consented to this filing.

ports veterans through "Hiring Our Heroes," a nationwide initiative launched in March 2011 to help veterans, transitioning service members, and military spouses find meaningful employment opportunities. *See* About Hiring Our Heroes, https://www.hiringourheroes.org/about-hiring-our-heroes/ (last visited January 29, 2019). To date, more than 31,000 veterans and military spouses have obtained employment opportunities through Hiring Our Heroes events. And more than 505,000 veterans and military spouses have been hired by more than 2,000 companies as part of the "Hiring 500,000 Heroes" campaign. *Id.* Given its commitment to supporting veterans, the U.S. Chamber has an interest in ensuring that veterans like Petitioner do not have their rights abridged by vacillating agency interpretations.

The Business Roundtable is an association of chief executive officers of leading U.S. companies working to promote a thriving U.S. economy and expanded opportunity for all Americans. Business Roundtable members lead companies that together have more than $7 trillion in annual revenues and employ more than 15 million employees. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formation of public policy, and the organization regularly participates in litigation as *amicus* where important business interests are at stake. Those interests include the clarity and stability of federal agency regulations to which its members and their companies are subject.

Association of American Railroads ("AAR") is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller

freight railroads, Amtrak, and some commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry. AAR's member railroads are subject to regulation by a number of federal agencies and therefore have a strong interest in the proper interpretation of agency regulations.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The business community benefits from laws that are clearly written and consistently applied. Notice-and-comment rulemaking provides businesses with an opportunity to help shape the regulatory landscape in which they operate. When the rulemaking process functions properly, regulated companies receive fair notice of what conduct is required or prohibited and are able to order their operations accordingly.

Auer deference creates a strong incentive for agencies to adopt vague regulations that they can later interpret however they see fit. This practice upsets the expectations of regulated parties and deprives them of the notice provided through rulemaking. Where agencies adopt vague regulations, businesses must attempt to predict how the agency will interpret those regulations and also how likely the agency is to change that interpretation in the future—often with no warning or opportunity to comment. *Auer* defer-

ence also makes it difficult to track an agency's shifting interpretations, which frequently appear in unpublished manuals, third-party letters, and *amicus* briefs.

II. Experience demonstrates the harmful real-world effects *Auer* has on businesses. In many cases, *Auer* deference has led courts to uphold agency interpretations that appear in obscure locations and do not comport with the best reading of the regulations in question. The result is increased compliance costs and staggering damages claims that cannot be predicted fairly from the rules.

III. *Auer* and *Seminole Rock* should be overruled because they violate separation-of-powers principles and conflict with the Administrative Procedure Act ("APA"). *Auer* deference violates separation-of-powers principles because it allows agencies both to write the laws and interpret them. *Auer* deference also conflicts with the plain language of Section 706 of the APA, which requires "the *reviewing court* [to] ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (emphasis added).

Policy considerations do not support continued adherence to *Auer* and *Seminole Rock* either. An agency's policy preferences, which are always subject to change, have no bearing on the purely interpretive task of deciding what the text of a rule *means*. Eliminating *Auer* deference will not prevent agencies from interpreting the rules they issue, or from amending those rules prospectively based on changed policy preferences. Rather, overruling *Auer* and *Seminole Rock* would simply ensure that when an agency issues a rule, that rule is always given its best meaning.

ARGUMENT

I. *Auer* Deference Increases Regulatory Uncertainty.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To ensure that federal regulations comply with this fundamental principle, the APA generally requires agencies to engage in notice-and-comment rulemaking before issuing substantive, binding regulations. *See* 5 U.S.C. § 553(b); *see also* 38 U.S.C. § 501(d) ("The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Secretary."). Notice-and-comment rulemaking is grounded in "notions of fairness" because it promotes "informed administrative decisionmaking" by allowing an agency to enact regulations "only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979).

Notice-and-comment rulemaking provides businesses with an important opportunity to help shape the administrative decisions that govern their industries. Every decision that a business makes—from hiring employees and opening new facilities to marketing and selling its products—requires an assessment of the legal implications of that decision. Where notice-and-comment rulemaking is used, businesses have the opportunity to present information to sup-

port the most sensible solutions to regulatory questions that affect their industries. And even where a regulated company's views are not reflected in the final regulations, businesses still benefit from having participated in the process because they gain a better understanding of the standards by which their conduct will be judged.

Auer and *Seminole Rock* undermine the important role played by notice-and-comment rulemaking. As the Court has explained, *Auer* deference encourages agencies to "promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (quoting *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)). The temptation for the agency to side-step formal rulemaking makes sense from the agency's perspective: issuing "vague regulations . . . maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting, joined by Stevens, O'Connor, Ginsburg, JJ.). But this incentive comes at the expense of clarity and predictability.

Seminole Rock and *Auer* also harm regulated companies by making it difficult to keep track of an agency's shifting views. When agencies engage in notice-and-comment rulemaking, they publish proposed rules in the Federal Register, and regulated parties know that they must watch the Federal Register for

rules that could affect them. But tracking an agency's interpretations of vague regulations is considerably more challenging because those interpretations could appear almost anywhere. For example, in *Auer*, the Court deferred to an agency interpretation advanced for the first time in an *amicus* brief. 519 U.S. at 461; *accord Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011).[2] The Court also has deferred to one agency's interpretation of another agency's regulation. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–99 (1991). And the Ninth Circuit recently deferred to an interpretation set forth in an agency field manual that claimed not to be "a device for establishing interpretive policy." *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 627 (9th Cir. 2018). The *Auer* doctrine has created a world in which businesses must scour court dockets, *amicus* briefs, agency websites, internal field manuals, letters sent to other companies, and other agencies' policies to fully understand the regulatory regime in which they operate.

The business community suffers from this approach to regulation. Where agencies promulgate vague rules that they can interpret later in a myriad of ways, companies have difficulty predicting what conduct is required or prohibited. Under *Auer*, it is not enough for a regulated entity to hire "an army of perfumed lawyers and lobbyists" to determine the

---

[2] Commentators have observed that certain agencies have "become particularly aggressive in 'attempt[ing] to mold statutory interpretation and establish policy by filing "friend of the court" briefs in private litigation.'" *E.I. Du Pont De Nemours & Co. v. Smiley*, 138 S. Ct. 2563, 2564 (2018) (Gorsuch, J., respecting the denial of certiorari).

fairest reading of vague regulations or to seek guidance from the agency. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). "Even if the [regulated party] somehow manage[s]" to divine the agency's preferred interpretation, it "must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Id.* This approach is inconsistent with the fundamental due process notion that regulated parties must be "free to steer between lawful and unlawful conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

In *Christopher*, the Court took an important step to limit *Auer* and *Seminole Rock* by refusing to defer to an agency's interpretation of ambiguous regulations that "impose[d] potentially massive liability ... for conduct that occurred well before that interpretation was announced." 567 U.S. at 155–56. But *Christopher* has not eliminated *Auer*'s adverse effects on businesses. On the contrary, *Auer* deference has continued to "metastisiz[e]" in the intervening years. *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari).

II. *Auer* Deference In Action: A Litany of "Greatest Misses."

Auer deference leads to results that depart from the best reading of applicable regulations and that increase regulatory uncertainty. Several "greatest misses" illustrate the need for *Auer* and *Seminole Rock* to be overruled.

A recent en banc Ninth Circuit decision epitomizes the uncertainty created by *Auer*'s "nesting dolls" approach to layer upon layer of deference. *Marsh*, 905 F.3d at 634 (Graber, J., concurring in part and dissenting in part). At issue in *Marsh* was the interpretation of the Department of Labor's "dual jobs" regulation for tipped employees—a regulation that itself "d[oes] not track the statute." *Id.* at 639 (Ikuta, J., dissenting). "As it has done on many earlier occasions, the [Department of Labor] issued its" interpretation of the "dual jobs" regulation "through an unpublished internal manual, and then sought controlling deference via an amicus brief." *Id.* at 651 (Ikuta, J., dissenting). That interpretation perplexingly defined one term ("dual jobs") to have two different meanings. *Id.* at 634 (Graber, J., concurring in part and dissenting in part). Both the district court and the Ninth Circuit panel recognized the problems with the agency's interpretation and refused to defer to it, characterizing the position as "a de facto new regulation masquerading as an interpretation." *Id.* at 617. But the en banc Ninth Circuit relied on *Auer* to reverse, *id.* at 632, exposing businesses "to staggering damages claims." *Id.* at 651 (Ikuta, J., dissenting).

The story does not end there. After the en banc Ninth Circuit decision, the Department of Labor revised its interpretation of the rule, rejecting the interpretation of "dual jobs" to which the Ninth Circuit deferred. *See* U.S. Dep't of Labor, Opinion Letter FLSA2018-27 (Nov. 8, 2018), https://www.dol.gov/whd/opinion/FLSA/2018/2018_11_08_27_FLSA.pdf. But because of this rapid change in position, a federal

court recently refused to defer to the agency's new interpretation, leaving the meaning of the regulation in flux once again. *See Cope v. Let's Eat Out, Inc.*, — F. Supp. 3d —, 2019 WL 79367, at *5 (W.D. Mo. Jan. 2, 2019). The result is a regulatory hall of mirrors where the hundreds of thousands of businesses that hire tipped employees cannot reliably determine the meaning of a rule they are required to follow.

Tales of similarly problematic applications of *Auer* deference abound. In another case, *Auer* deference led the D.C. Circuit to uphold an agency interpretation "dramatically expand[ing] the number of people" who can "examine highly sensitive personnel security files." *Bigelow v. Dep't of Defense*, 217 F.3d 875, 881–82 (D.C. Cir. 2000) (Tatel, J., dissenting). These files contain "information about political associations, criminal or dishonest conduct, mental illness, family relationships, financial circumstances, drug and alcohol use, sexual behavior, etc." *Id.* at 878. Because of the sensitivity of that information, federal regulations specified a discrete list of officials who could access the security files. *See id.* But based on "nothing more than the position of the U.S. Attorney and the two AUSAs who signed the brief," the Government read in an exception that gave *additional* access "to any supervisor anywhere in the Department who doubts an employee's loyalty." *Id.* at 880. The D.C. Circuit nevertheless deferred. *Id.* at 881–82.

Likewise in *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003), the Fourth Circuit granted *Auer* deference to an agency interpretation that had not even been articulated by the agency in question. Instead, the court "divine[d]"

and then deferred to an interpretation that likely contradicted the text of the regulation. *Id.* at 450–51 (Luttig, J., concurring in part and dissenting in part). The majority accomplished this divination by "reviewing the ten years of correspondence between the EPA and the Corps." *Id.* at 451 (Luttig, J., concurring in part and dissenting in part). The holding imposes on regulated companies the task of parsing years of agency correspondence to decipher an interpretation that contradicts the text of the rule.

Just weeks ago, a panel of the D.C. Circuit issued yet another opinion "demonstrat[ing] the perils of deferring to an agency's wayward interpretation of its own regulation." *San Diego Gas & Electric Co. v. FERC*, — F.3d —, 2019 WL 190306, at *14 n.4 (D.C. Cir. Jan. 15, 2019) (Randolph, J., dissenting). The case involved a Federal Energy Regulatory Commission incentive regulation that grants utilities the right to "[r]ecove[r] ... 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility." *Id.* at *2; *see id.* at *10 (quoting 18 C.F.R. § 35.35(d)(1)(vi)). Even though the regulation does not exclude costs based on when they were incurred, FERC interpreted this "100 percent" recovery rule as applying only to costs incurred after FERC issues an order determining that a facility is eligible for the incentive. *See id.* at *5. As a result, the order "granted [the utility] some $15 million less than 100 percent of the costs of the project." *Id.* at *14 (Randolph, J., dissenting).

The Commission defended its interpretation by invoking *Auer* deference,[3] and a divided panel of the D.C. Circuit granted the Commission's request, "defer[ring] to FERC's interpretation" of the regulation. *Id.* According to the panel majority, the Commission reasonably read the regulation as allowing "less than 100 per cent" recovery "where circumstances so demand." *Id.* at *10. As that outcome shows, *Auer* deference results in a regime under which businesses cannot reliably anticipate a rule's meaning even when it speaks in clear, mathematical terms. A doctrine that permits agencies to award less than 100 percent of costs under a regulation stating that "100 percent" of costs are recoverable, *id.*, is not a doctrine worthy of continued application.

Yet another example of an agency using *Auer* and *Seminole Rock* to skirt notice-and-comment rulemaking is *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995). There, a statute required the Secretary of Health and Human Services to promulgate regulations establishing rules for Medicare cost reimbursements. *See id.* at 91–92. The agency promulgated a rule, but that rule did not address the specific reimbursement question Congress had delegated. *See id.* at 92–93; *id.* at 103 (O'Connor, J., dissenting). Instead, the agency resolved the question in a subsequent reimbursement manual that did not go through notice-and-comment rulemaking. *See id.* at 110 (O'Connor, J., dissenting). The Court granted controlling deference to that manual under *Seminole Rock*

[3] Brief for Respondent Federal Energy Regulatory Commission, *San Diego Gas & Electric Co. v. FERC*, No. 16-1433, at 2 (D.C. Cir. filed Sept. 15, 2017).

despite this shortcoming. Thus, *Seminole Rock* enabled the agency to circumvent Congress's mandate and deprive "the public [of] a valuable opportunity to comment on the regulation's wisdom." *Id.* (O'Connor, J., dissenting).

Auer deference likewise has led to anomalous results in numerous other cases. *See, e.g., Garco Constr., Inc. v. Spear*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from denial of certiorari) (discussing Federal Circuit opinion that blessed the Army's "textually dubious" change to a rule interpretation that favored the Army in a pending contract dispute); *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (criticizing Seventh Circuit opinion that relied on *Auer* to find a defendant liable for breach of contract based on an interpretation, announced for the first time in an *amicus* brief and that was "at odds with the regulatory scheme [and] defie[d] ordinary English"); *M.R. v. Dreyfus*, 697 F.3d 706, 716 (9th Cir. 2012) (Bea, J., dissenting from denial of rehearing en banc) (criticizing deference to Department of Justice statement of interest asserting that "an *even-handed* reduction of a voluntarily-provided welfare benefit" constituted "'discrimination' under the" Americans with Disabilities Act (emphasis added)).

In short, *Auer* deference gives agencies the incentive to promulgate broad, shapeless regulations, thus undermining the purpose of notice-and-comment rulemaking; license to ignore the most natural reading of their own rules; and the ability to adopt interpretations in obscure, difficult-to-find locations beyond the reach of many regulated parties. The result is great

uncertainty for the business community and the broader public who benefit from clear regulations that provide fair notice of what is required or prohibited. It also imposes significant costs, both in terms of compliance and potential damages, for businesses of all sizes that miscalculate the agency's position.

III. *Seminole Rock* And *Auer* Should Be Overruled.

Auer and *Seminole Rock* defy the Constitution's separation of powers, cannot be reconciled with the text of the APA, and cannot be justified by policy considerations. They should be overruled.

A. *Auer* and *Seminole Rock* Violate Separation-Of-Powers Principles.

Auer and *Seminole Rock* should be overruled because they violate separation-of-powers principles. By giving "controlling weight" to most agency interpretations, courts "violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part); *see also* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny."). This deference "to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk America, Inc.*, 564 U.S. at 69 (Scalia, J., concurring). In this

way, *Auer* is "a dangerous permission slip for the arrogation of power." *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part, dissenting in part).

Auer deference also flouts the Constitution's guarantee that cases and controversies will be decided by "neutral decisionmakers who will apply the law as it is, not as they wish it to be." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). Just as a court would not defer to an act of Congress purporting to interpret a prior statute, so it should not defer to an agency's interpretation of its prior regulations. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 651–54, 691–92 (1996).

This case demonstrates the threat to separation-of-powers principles posed by *Auer* and *Seminole Rock*. In the middle of the adjudication of a veteran's benefit claim, the agency advanced an interpretation of its own regulation that caused Petitioner to lose approximately 23 years of retroactive benefits. *See* Pet. App. 14a–15a & n.10. The Federal Circuit deferred to the agency's interpretation despite recognizing that Petitioner had advanced a reasonable interpretation of the agency's rule. *See* Pet. App. 16a. "This type of conduct 'frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government,'" *Garco Constr., Inc.*, 138 S. Ct. at 1053 (Thomas, J., dissenting), resulting in "precisely the abuse[] that the Framers sought to prevent," *Perez v.*

Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring).[4]

B. *Auer* and *Seminole Rock* Are Contrary To The APA.

The APA expressly provides that "the reviewing court shall ... determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706.[5] The statute further defines "agency action" to "include[] the whole or a part of an agency rule." 5 U.S.C. § 551(13). Section 706 thus "contemplates that courts, not agencies, will authoritatively resolve ambiguities in . . . regulations." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (emphasis added). Despite the Court's contrary holdings in *Auer* and *Seminole Rock*, the APA makes clear that it is "the

---

[4] *Stare decisis* poses no obstacle to reversal because *Auer* and *Seminole Rock* set forth a judge-made interpretative rule. *See Perez*, 135 S. Ct. at 1214 n.1 (Thomas, J., concurring in the judgment) (citing Caleb Nelson, *Statutory Interpretation* 701 (2011)). The Court can set aside the doctrine in the same way it could set aside other "judge-made rule[s]" when "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

[5] The statutory dictate that courts, rather than agencies, interpret regulations applies equally to the VA. *See* 38 U.S.C. § 502 (providing that review of VA rules "shall be in accordance with chapter 7 of title 5"); *see also* 38 U.S.C. § 7261(a)(1) (requiring the Court of Appeals for Veterans Claims to "determine the meaning or applicability of the terms of an action of the Secretary"); 38 U.S.C. § 7292(d)(1) (requiring Federal Circuit to "hold unlawful and set aside any regulation or any interpretation thereof" it finds to be "an abuse of discretion, or otherwise not in accordance with law").

responsibility of the court to decide whether the law means what the agency says it means." *Id.*

Auer deference contradicts this statutory scheme by requiring courts to accept an agency's interpretation of its own action that differs from the best reading of that action. Indeed, "[s]o long as the agency does not stray beyond the ambiguity in the text being interpreted, deference *compels* the reviewing court to 'decide' that the text means what the agency says." *Id.* at 1212 (Scalia, J., concurring in the judgment). Had Congress contemplated the sort of plain-error review that *Auer* imposes, it could have said so in the APA. But Congress instead instructed courts to determine the meaning of agency action, which requires more than deferring to the agency except when its interpretation is plainly erroneous.

Interpreting the APA to require judicial determination without *Auer*'s binding deference regime also comports with traditional understandings of the meaning of judicial review. It is one thing for an agency to express its views on what its regulation means and to advocate that courts should follow that interpretation. But it is another thing entirely to *require* courts to accept those views even where the text, structure, and history show the superiority of a different reading. The judicial power "requires a court to exercise its independent judgment in interpreting and expounding upon" regulations. *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment). Section 706 of the APA must be read in conformity with this long-held understanding of the judicial power. *See* Manning, *supra*, at 637.

Auer further conflicts with the APA because it contradicts the statute's basic structure. The APA requires rules that will have the force and effect of law to go through notice-and-comment rulemaking. *See* 5 U.S.C. § 553. Although the APA allows non-binding interpretive rules to be issued without notice-and-comment rulemaking, these rules only can "*advise* the public by explaining [the agency's] interpretation of the law." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment). Interpretive rules cannot be used "to *bind* the public by making law." *Id.*

The *Auer* doctrine circumvents these legislative safeguards. Agencies now can issue interpretations that are given binding deference unless they are so strained as to be plainly erroneous. Because people are "bound to obey [such interpretations] on pain of sanction," interpretations "that command deference *do* have the force of law." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). *Auer* therefore creates a "loophole" to the APA's statutory scheme that is "at odds with the APA's fundamental structure." Allyson N. Ho, *Why Seminole Rock Should Be Overruled*, 36 Yale J. on Reg.: Notice & Comment (Sept. 19, 2006), http://yalejreg.com/nc/2039-2/.

The Court has never attempted to reconcile *Auer* deference with the text of the APA or similar statutes. In *Auer*, the Court "[n]ever mention[ed] § 706's directive." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment). Instead, the Court simply relied on *Seminole Rock*, even though that case was decided before Congress enacted the APA. *See id.* Because *Auer* and *Seminole Rock* conflict with the APA, those decisions are not sufficiently "well reasoned" for

the Court to continue following them. *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009).

C. *Auer* and *Seminole Rock* Cannot Be Justified On Policy Grounds.

Policy considerations do not support continued adherence to *Auer* and *Seminole Rock*. In particular, *Auer* deference cannot be justified based on agencies' purported expertise in divining the true intent of ambiguous regulations. *Cf., e.g., Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150–51 (1991).

Policy expertise may be relevant to an agency's decision to adopt particular regulations, but that expertise is irrelevant to the purely interpretive task of determining what the text of those regulations means. *See Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment) ("The proper question faced by courts in interpreting a regulation is not what the best policy choice might be, but what the regulation means."). And even if the intent of the original drafter of the ambiguous regulations could be determined, that subjective intent should carry no weight. The ambiguity should instead be resolved by determining the best reading of the regulation based on the traditional tools of interpretation. *See id.* at 1222–23; *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring in the judgment) ("[I]t does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable."); *see also Zuni Pub. Sch.*

Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) ("Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated.").

Overruling *Auer* and *Seminole Rock* would not deprive agencies of the ability to interpret the regulations they issue or to amend those regulations when circumstances or changes in policy require. Even without *Auer* deference, an agency would remain free to adopt its own view of what a particular regulation means, and to advocate for that view in litigation—either as a party or as *amicus curiae*. Absent *Auer* deference, agencies would also have the ability to revise the scope of their rules through notice-and-comment rulemaking—a mechanism that, unlike deference to agencies, Congress expressly included in the APA. Indeed, dispensing with *Auer* deference would affect agencies in only one narrow way: they would lose the ability to force courts to accept second- or third-best rule interpretations. There is no good reason to continue that practice.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted,

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H. St. NW
Washington, DC 20062
(202) 463-5337

Counsel for Chamber of Commerce of the United States of America

Liz Dougherty
BUSINESS ROUNDTABLE
300 New Jersey Ave., N.W.
Washington, DC 20001
(202) 872-1260

Counsel for Business Roundtable

Kathryn Kirmayer
Daniel Saphire
Association of American Railroads
425 3rd Street SW
Suite 1000
Washington, DC 20024
(202) 639-2508

Counsel for Association of American Railroads

Mark W. Mosier
Counsel of Record
Kevin F. King
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
MMOSIER@COV.COM
(202) 662-6000

Kathryn E. Cahoy
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square
Palo Alto, CA 94306
(650) 632-4700

Counsel for Chamber of Commerce of the United States of America

January 2019

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,
Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF STEPHEN C. CONNAKER AND THE MILITARY & VETERANS' LAW INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

WILLIAM J. BROWN, JR.
Counsel of Record
MATTHEW K. WEGNER
BROWN WEGNER LLP
SUITE 1260
2010 MAIN STREET
Irvine, California 92614
bill@brownwegner.com
(949) 705-0080
Counsel for Amici Curiae

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. Separation of Powers Is One of the Most Important Structural Features of the Constitutional Design to Protect Liberty. 6

II. *Seminole Rock* and *Auer* Deference Violate the Separation of Powers. 11

III. *Auer* and *Seminole Rock* May be Overruled Consistent with Traditional *Stare Decisis* Principles. 17

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 19

Auer v. Robbins, 519 U.S. 452 (1997) 4, 5, 7, 13

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 4, 5, 7

Buckley v. Valeo, 424 U.S. 1 (1976) 10

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) 5, 14, 16

Christensen v. Harris Cty., 529 U.S. 576 (2000) .. 19

Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012) 18

Decatur v. Paulding, 39 U.S. 497 (1840) 19

Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597 (2013) 7, 17

Egan v. Delaware River Port Auth., 851 F.3d 263 (3d Cir. 2017) 18

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) 15

FCC v. MCI Telecommunications Corp., 439 U.S. 980 (1978) 13

Garco Const., Inc. v. Speer, 138 S.Ct. 1052 (2018). 6

Gonzales v. Oregon, 546 U.S. 243 (2006) 19

INS v. Chadha, 462 U.S. 919 (1983) 9, 10, 20

TABLE OF AUTHORITIES
(continued)

Janus v. Am. Federation of State, Cty., and Mun. Employees, Council 31, 138 S.Ct. 2448 (2018) 18, 19

Kilbourn v. Thompson, 103 U.S. 168 (1880) 10

Marbury v. Madison, 5 U.S. 137 (1803) 6, 11, 15

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 13

Miller v. Johnson, 515 U.S. 900 (1995) 15, 18

Mistretta v. United States, 488 U.S. 361 (1989).. 10, 11

Morrison v. Olson, 487 U.S. 654 (1989)..... 8, 12

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm, 463 U.S. 29 (1983)..... 15

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) 14

Payne v. Tennessee, 501 U.S. 808 (1991)..... 17, 20

Pearson v. Callahan, 555 U.S. 223 (2009) 18, 20

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) 7

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 6, 8, 14, 20

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)..... 18

Seminole Rock 12, 13

TABLE OF AUTHORITIES
(continued)

Springer v. Philippine Islands, 277 U.S. 189 (1928) 11

Talk Am., Inc. v. Michigan Bell Tel. Co., 564 U.S. 50 (2011)..... 19

Talk America, Inc. v. Michigan Bell Tel. Co., 564 U.S. 50 (2011) 7

Turtle Island Restoration Network v. United States Dep't of Commerce, 878 F.3d 725 (9th Cir. 2017)..... 18

United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016)..... 14

United States v. Klein, 13 Wall. 128 (1872) 12

United States v. Nixon, 418 U.S. 683 (1974).. 11, 15

United Student Aid Funds, Inc. v. Bible, 136 S.Ct. 1607 (2016)..... 7

OTHER AUTHORITIES

1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992)..... 8, 16

Brutus, Essay XV (1788), 2 THE COMPLETE ANTI-FEDERALIST 437 (Herbert J. Storing ed. 1981)9

John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001)..... 10

TABLE OF AUTHORITIES
(continued)

John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997) 8

Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949)8

Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 294 (2014) 19

The Federalist No. 47 (James Madison) (C. Kesler and C. Rossiter, ed., 2003) 5

The Federalist No. 48 (James Madison) 9, 10

The Federalist No. 51 (James Madison)9, 10, 12, 15

The Federalist No. 70 (Alexander Hamilton) 13

The Federalist No. 78 16

The Federalist No. 9 (Alexander Hamilton) 9

Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959) 9

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae, Mr. Stephen C. Connaker is a Vietnam-era US Army veteran, who suffered for decades with Post Traumatic Stress Disorder and other debilitating mental ailments stemming from psychological trauma he suffered when he was nineteen years old, during his service in the Army. In April of 2007, Mr. Connaker submitted a claim for Veterans Administration benefits, but the VA issued a decision denying the claim on the ground that his ailments were not connected to his military service. The toll of the mental conditions and lack of benefits left Connaker homeless and in despair after his claim was denied.

In 2009, Mr. Connaker retained the pro bono lawyers and law students at *Amicus Curiae*, The Military & Veterans' Law Institute, to assist him in litigating his case before the VA. His counsel filed a Notice of Disagreement to appeal the decision denying his claim, which triggered a De Novo Review of his claim pursuant to 38 C.F.R. § 3.2600. In April 2010, a VA Decision Review Officer issued a decision finding that Mr. Connaker's PTSD and other mental conditions were indeed connected to his military service, awarding him a 100% disability rating, with retroactive benefits dating back to the

---

[1] This brief is filed with the consent of the parties. Counsel for Petitioner consented to the filing of this brief via electronic mail sent to counsel for *amici curiae*, and counsel for Respondent filed a blanket consent. No party, and no party's counsel, authored this brief in whole or in part. No person, other than *amicus curiae* and its counsel, paid for or made monetary contributions to fund the preparation or submission of this brief.

initial date of his claim, April 12, 2007. This entitled Mr. Connaker to significant back-pay.

Mr. Connaker is an interested person because he knows - first hand - how difficult maneuvering in the claims process of VA can be, particularly for those veterans suffering with PTSD. Mr. Connaker spent a great deal of time and effort attempting unsuccessfully to navigate his way through the VA administrative claims process without counsel. Given his complicated circumstances and the unique nature of his condition, Mr. Connaker believes he could not have succeeded in his claim without assistance of counsel. Like many veterans, such as the Petitioner in this case, Mr. Kisor, Mr. Connaker has suffered with chronic PTSD connected to his service in the military. Mr. Connaker wishes to emphasize to the Court that the award of VA benefits, and particularly the retroactive back-pay, is what allowed him to begin putting his life back together and to begin recovering from the decades of suffering. He realizes that it is a matter of good fortune that his claim was granted and that it did not take many more years. For that reason, Mr. Connaker deeply sympathizes with his fellow veterans whose VA cases face greater delays or unwarranted difficulties.

Mr. Connaker believes that Mr. Kisor suffered unnecessarily, without benefits and treatment he needed, for more than two decades. Mr. Connaker, a fellow veteran, has an abiding interest in this case. He believes it is an important opportunity for the Supreme Court to do away with interpretive deference--a systemic hurdle that provides officials

at the Veterans Administration unjust discretion to deny otherwise meritorious claims.

Amicus Curiae The Military and Veterans' Law Institute is a premiere non-profit research, academic, and clinical center at Chapman University. The Institute's legal clinic provides pro bono representation to military personnel and veterans in matters ranging from military Discharge Upgrades, Traumatic Service Group Life Insurance Appeals, and VA Benefits Appeals, as well as other matters arising under federal statutes, such as including the Service Members Civil Relief Act (SCRA) and the US Employment and Re-employment Rights Act (USERRA). In addition to direct representation of veterans and servicemembers, The Military and Veterans' Law Institute faculty also engage in scholarly research and writing. They have testified before Congress on issues ranging from military voter protections, to Guantanamo Bay, to personnel issues impacting Military members, and regularly publish opinion pieces. The Institute's founder and Executive Director, Professor Kyndra Rotunda, has published textbooks and legal practice guides for other clinics and practitioners who represent military member and veterans.

This case is of particular interest to *amici* because the outcome could affect all veterans whose eligibility for benefits is subject to administrative determinations; this naturally impacts the mission of the Military and Veterans' Law Institute and the individuals it serves. Given its mission of supporting veterans, the Military and Veterans' Law Institute has a keen interest in ensuring that veterans like

Petitioner do not have their rights abridged by judicial deference to agency interpretations that would otherwise be rejected.

The Institute's most significant struggle in representing its clients arises from the systemic uncertainty of the VA's and other administrative boards' shifting interpretations of regulations to reach results that favor the agency. Based on extensive first-hand experience representing pro bono clients who are prejudiced by random determinations and misplaced deference to agency decisions, the Institute contends that the continued application of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and *Auer v. Robbins*, 519 U.S. 452 (1997) serves no good purpose. *Amici* acknowledge that other members of the regulated public, who are subject to a vast array of administrative interpretations, face similar disadvantages when challenging agencies. Affording such deference effectively enables the executive branch to usurp judicial and legislative powers--powers that the Constitution expressly assigns exclusively to the other co-equal branches. This case presents the Court with an opportunity to review this controversial standard and to restore the proper structural limits on the administrative functions.

SUMMARY OF ARGUMENT

This case asks whether the Constitution's text and structure, specifically its separation of powers principles, require or permit courts to defer to a federal administrative agency's interpretation of its own ambiguous regulations. In fact, that interpretive authority belongs primarily to the

judiciary because "the preservation of liberty requires that the three great departments of power should be separate and distinct;" and because, concomitantly, the agencies' interpretation of their own regulations is a usurpation of the judicial prerogative. The Federalist No. 47 (James Madison) (C. Kesler and C. Rossiter, ed., 2003).

The doctrine of deference to an agency's interpretation of its own regulations, first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and ossified in *Auer v. Robbins*, 519 U.S. 452 (1997), violates standard separation of powers principles. Those principles are derived from the three Vesting Clauses of the Constitution allocating the limited national government's powers to a Congress, a President, and a judiciary. Deferring to an agency's interpretation of its own regulations is no less indefensible than deferring to Congress about the meaning of statutes would be. It is also a recipe for post-hoc agency gamesmanship to ensure the regulator generally wins over the regulated, the governor over the governed. This is not the scheme of separated powers the Framers envisioned.

Furthermore, by misallocating judicial power and thus threatening individual liberty, *Auer* exacerbates the extant problem of delegation of lawmaking powers to unelected executive officials. That delegation already is at the constitutional breaking point under step two of the *Chevron* doctrine. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Auer* also deprives the judiciary of its constitutionally-ensconced and rightful authority to interpret the

laws, an authority this Court has recognized for the past 215 years. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Several members of this Court have in recent years acknowledged the constitutional problems with the *Auer* deference doctrine, and the doctrine should now be overruled.

ARGUMENT

I. Separation of Powers Is One of the Most Important Structural Features of the Constitutional Design to Protect Liberty.

Essential for the preservation of individual liberty, the Constitution's separation of powers is "a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (Scalia, J.) (emphasis in original). It is "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Id.*

Several members of this Court have recognized that various doctrines of deference to the unelected, unaccountable, and largely-unknown federal bureaucracy might be difficult to reconcile with the separation of powers' "high walls." *Id.* In particular, members of this Court believe that *Auer* deference is on its "last gasp." *Garco Const., Inc. v. Speer*, 138 S.Ct. 1052, 1053 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari); *id.* at 1052 ("*Seminole Rock* deference is constitutionally suspect."); *United Student Aid*

Funds, Inc. v. Bible, 136 S.Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari). Even *Auer's* author rejected the doctrine. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in judgment) (announcing that he would be "abandoning" the holding in *Auer* that he himself authored); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620-21 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* is . . . a dangerous permission slip for the arrogation of power" (citing *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 67-68 (2011) (Scalia, J., concurring)); John F. Manning, "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules," 96 Colum. L. Rev. 612 (1996)); *see also Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in judgment) ("these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations"); *id.* at 1210-11 (Alito, J., concurring in part and concurring in judgment) ("The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect. . . . I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument"); *Decker*, 133 S.Ct. at 1338 (Roberts, C.J., joined by Alito, J., concurring) ("It may be appropriate to reconsider that principle in an appropriate case").

There is good reason for this willingness to reconsider *Auer*. The rule announced in *Seminole Rock* and confirmed in *Auer* contravenes the separation of powers—a structural feature of the federal constitution considered vital by the Framers

and Ratifiers—because it gives to the agencies the judiciary's prerogative of construing ambiguous regulations. *Auer* damages the judiciary, of course, but it also damages the Executive by setting up an inherent conflict between the President and the agencies. Ultimately, though, *Auer*'s denigration of the separation of powers injures the individual's liberty the most. In this respect, *Auer*'s sins are obvious, and no "careful and perceptive analysis" is required to observe the "important [and adverse] change in the equilibrium of power" it effectuates. *Morrison v. Olson*, 487 U.S. 654, 699 (1989) (Scalia, J., dissenting). But even if *Auer*'s threat to individual liberty somehow had rendered it just a wolf "in sheep's clothing," *id.* (Scalia, J., dissenting), the separation of powers' "high walls and clear distinctions" would still require its demise, *Plaut*, 514 U.S. at 239.

Separation of the powers of government is foundational to our constitutional system precisely because the Framers and Ratifiers of the Constitution understood well that this principle was necessary to protect individual liberty. Accordingly, the founding generation relied on the works of Baron de Montesquieu, William Blackstone, and John Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government itself. The Federalist No. 51 (James Madison), *supra at* 318; The Federalist No. 47, *supra at* 298-99; The Federalist No. 9 (Alexander Hamilton), *supra at* 67; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959). That design divided the power of the national government into three distinct branches, by vesting the legislative authority in Congress, the executive power in the President, and the ultimate judicial responsibilities in this Court. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

The ratification debates demonstrate the importance of this separation to the founding generation. Accepting as a given that power needed to be separated, the ratifying generation debated whether the proposed constitutional text separated power *enough*. The Federalist No. 48 (James Madison), *supra* at 305. This was a rare issue on which the federalists and the anti-federalists agreed. Even the anti-federalist Brutus noted that "[when] power is lodged in the hands of men independent of the people, and of their representatives . . . no way is left to controul them." Brutus, Essay XV (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 442 (Herbert J. Storing ed. 1981). In short, the ratifying generation suffered from no agnosticism or crisis of confidence about the urgent imperative to diffuse power both horizontally (among the coordinate federal branches) and vertically (between the United States and the sovereign States).

Alarmed that just stopping one branch from exercising the powers of another would prove insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachments by another. The Federalist No. 48, *supra* at 305. Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; The Federalist No. 51 (James Madison), *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380 (1989).

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. So much so that any attempt by any branch of government to encroach on another branch's powers, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The duty falls on the judicial branch, in particular, to enforce this essential protection of liberty. *Chadha*, 462 U.S. at 944-46. To be sure, the Constitution was designed to pit ambition against ambition and power against power. The Federalist No. 51, *supra* at 319; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). But when this structural competition of interests does not stop an encroachment, this Court is obligated to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199. Judicial engagement at

such critical moments is an imperative and a virtue, not a vice. It is a principal reason that the judiciary was created.

II. *Seminole Rock* and *Auer* Deference Violate the Separation of Powers.

The judiciary, like any other branch, must jealously guard its rightful authority so that structural protection of individual liberty flourishes. *See Springer v. Philippine Islands*, 277 U.S. 189, 201-02 (1928) ("the executive cannot exercise either legislative or judicial power."). The judiciary readily has done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). While each branch has its own constitutional duty to interpret and adhere to the Constitution, the judiciary cannot abdicate its own constitutional responsibility to interpret the law by giving dispositive deference to the interpretations of the other branches. *United States v. Nixon*, 418 U.S. 683, 704 (1974) ("[T]he judicial power . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power. . . . Any other conclusion would be contrary to the basic concept of separation of powers.").

The power to interpret regulations and to give authoritative effect to those interpretations is a judicial power. *Marbury*, 5 U.S. at 177. The

deference shown under *Seminole Rock* and *Auer* abdicates the judiciary's constitutional responsibility of construing regulations to the agencies. Thus, this deference cedes judicial power to the Executive; and it invites the very concentration of power that the founding generation rejected. *See* Manning at 674-75; The Federalist No. 51, *supra at* 318-19 ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives, to resist encroachments of the others"). As Dean Manning has observed, *Seminole Rock* deference also dilutes political constraints on agency action, allowing narrow interest groups to wield disproportionately large influence on the agency. *See* Manning at 675.

Additionally, *Auer* deference damages the Executive because it induces a President/agency schism, Article II's Vesting Clause notwithstanding. *See* Art. II, § 1, cl. 1 ("[t]he executive Power shall be vested in *a* President of the United States") (emphasis added); *see also Morrison*, 487 U.S. at 698-99 (Scalia, J., dissenting) (analyzing historical sources); *United States v. Klein*, 13 Wall. 128, 147 (1872) (disfavoring even "inadvertent" encroachments of one branch on another's preserve). Often, the President has little, if any, control over the interpretation given to a regulation by an agency supposedly reposed within his branch and under his Article II authority. The President's and the agency's interpretive approaches and bottom-line views on what a legal instrument means might, and often do, clash. *See, e.g., Metro Broadcasting, Inc. v.*

FCC, 497 U.S. 547, 551 (1990) (contradictory briefs filed by the United States and the Federal Communications Commission (FCC) as to the constitutionality of the FCC's affirmative-action program); Petitioner FCC's Reply to "Brief for the United States in Opposition" at 1 n.1 (FCC brief in case construing an agency order chiding the Solicitor General and "questioning exactly what interests of the United States the Solicitor legitimately represents in this case."), *FCC v. MCI Telecommunications Corp.*, 439 U.S. 980 (1978) (cert. denied). *Auer* creates these fissures within the Executive Branch and threatens the President's traditional dominion over his own branch.

According to the Framers and Ratifiers of our Constitution, such an intra-Executive schism disrupts the Presidency's "unity," which "is conducive to [its] energy," and its structural integrity. The Federalist No. 70 (Alexander Hamilton), *supra at* 422-23. Realizing some of the worst fears of the Framing generation, *Auer* deference has "destroyed" the Presidency's "unity" by splitting its power and "vesting" it "in two or more magistrates of equal dignity and authority." *Id.* at 423. No longer does the President get to enjoy the residual executive power that Article II vests *only* in that office. Instead, *Auer* has "[en]feeble[d]" the Presidency, a result that "implies a feeble execution of the government" itself—thus demoting it to the status of being "a bad government." *Id.* at 422. As a consequence, *Seminole Rock* and *Auer* have inflicted incalculable injury on both the judiciary and the Executive. To paraphrase Justice Scalia's

opinion for the *Plaut* Court, weak fences make weak neighbors. 514 U.S. at 240.

To be sure, Congress might be able to delegate the task of filling in scientific and technical details in a regulatory scheme to an agency by "leaving a gap for the agency to fill" through a formal process of notice-and-comment rulemaking. *Chevron USA*, 467 U.S. at 843-44.[2] The purpose in doing this is to allow an agency to exercise its unique expertise in the service of the policy adopted by Congress. Once the agency has "filled the gap" left by Congress through the formal rulemaking process, however, no deference should be shown to any subsequent interpretation (or reinterpretation) of those regulations. If an agency finds the need to reverse its policy or significantly alter its position, it has the power to do so. It only needs to promulgate a new rule, through the notice-and-comment process, explaining the reasons for its change. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm*, 463

---

[2] This should be distinguished from deferring to administrative diktats that the statutory text means one thing on one day, and something completely different on another day. *Compare National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 973 (2005) (upholding FCC determination that broadband internet providers were computer service providers rather than telecommunication providers under the Telecommunications Act of 1996) *with United States Telecom Ass'n v. FCC*, 825 F.3d 674, 695 (D.C. Cir. 2016), *cert. denied*, 139 S.Ct. 454 (2018) (upholding FCC's new ruling that broadband internet providers are now telecommunications providers rather than computer services providers—under the same statutory scheme).

U.S. 29, 42 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009).

The ultimate power to interpret the meaning of a regulation—as a legal text—properly belongs to the judiciary, not the agency that promulgated that regulation. Of course, in applying a regulation, the agency must make some interpretation in practice. But that necessary executive function cannot exclude the judiciary from exercising its constitutional authority. Continuing to give controlling deference under *Auer* and *Seminole Rock* to agency interpretations transfers the judiciary's constitutional power to the Executive.

From the early days of the Republic, this Court has agreed that the courts have both the power and duty to interpret the law. *See Marbury*, 5 U.S. at 177. Later cases have relied on these principles to reject a call for deference to legal interpretations by the Department of Justice. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995). Each branch of government must support and defend the Constitution and thus must interpret the Constitution. The Courts may not, however, cede their judicial power to interpret the laws to the Executive. See *Nixon*, 418 U.S. at 704.

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. The Federalist No. 51, *supra* at 269. This explains why this Court in *Marbury* did not simply declare legal interpretation to be a judicial power. Instead, the Court ruled that it was the duty of the judiciary to *exercise* that power. *Marbury*, 5 U.S. at 177. In

order to keep the political branches in check, this Court may not surrender its power to interpret the law to either of the political branches. The failure to exercise this duty would be an invitation to "partiality and oppression." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Bk 1 § 2, at 58 The rule of controlling deference to agency interpretation of ambiguous regulations, however, is a surrender of judicial power and a decision to cede to the Executive the judicial power.

Chevron deference, when applied to an agency, using its specialized expertise, to merely fill a gap in the technical details of a regulatory scheme, does not raise the same concerns for separation of powers present here. Under this original purpose of *Chevron* deference, the Court does not cede its power to interpret the law. Instead, the Court recognizes that Congress gives agencies clear policy guidance and then relies on those agencies to employ their specialized expertise (such as what level of exposure to a particular chemical is harmful) to fill in gaps in the legislative scheme. Until the agency has filled in those gaps in, the statute may not yet be complete in the sense that specialized expertise must be brought to bear on the problems that Congress sought to address. This use of agency expertise by Congress to fill in details in the regulatory scheme is not a part of the judicial function.

Once the agency has issued a regulation that carries the force of law, however, it then falls to the courts to interpret the regulation. In other words, it is the judiciary's job "to declare the sense of the law." The Federalist No. 78, *supra* at 405.

Granting deference to the agency to interpret its own ambiguous regulation cedes the judicial function to the Executive. This is an invitation to agencies to avoid the expense and bother of rulemaking proceedings when it wants to change its policy. Instead of going through the process to allow public participation and judicial review of the change, it can instead merely change how it interprets its existing regulations.

Denying "controlling deference" to an agency interpretation does not mean that the courts must ignore long-standing agency interpretations and practices. Those remain important interpretative tools. Yet the ultimate job of interpreting the legal text will remain with the courts. To do otherwise results in a failure of the duty of the judicial branch of government "to declare the sense of the law" and thus violates the separation of powers required by the Constitution.

III. *Auer* and *Seminole Rock* May be Overruled Consistent with Traditional *Stare Decisis* Principles.

"*Stare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). For several reasons, *stare decisis* does not support retaining *Auer* and *Seminole Rock*.

First, these decisions were not well-reasoned and, as explained earlier, remain indefensible. *Seminole Rock*, Justice Scalia noted, "offered no justification whatever" for deferring to an agency's interpretation of its own regulation. *Decker*, 568 U.S. at 617-18 (Scalia, J., concurring in part and dissenting in part); *see also Janus v. Am. Federation*

of State, Cty., and Mun. Employees, Council 31, 138 S.Ct. 2448, 2479 (2018) (considering the precedent's quality of reasoning in determining whether it should be retained). *Seminole Rock* and *Auer* deference has been the subject of special criticism by members of this Court and by lower court judges struggling to understand and apply the doctrine properly. *Pearson v. Callahan*, 555 U.S. 223, 234-35 (2009) (modifying the qualified-immunity inquiry for similar reasons); *see also Egan v. Delaware River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in judgment) ("The problems [*Auer* and *Chevron*] create are serious and ought to be fixed."); *Turtle Island Restoration Network v. United States Dep't of Commerce*, 878 F.3d 725, 742 n.1 (9th Cir. 2017) (Callahan, J., dissenting in part) ("*Auer*'s continued vitality is a matter of considerable debate.").

Second, this Court's intervening decisions have removed or weakened *Auer*'s and *Seminole Rock*'s conceptual underpinnings. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-81 (1989). As an initial matter, this Court now gives primacy to the salient instrument's text and structure, which has not always been the case. *Miller*, 515 U.S. at 922-23. Therefore, the agencies' views on what their regulations mean has diminished value to the Court. Moreover, this Court has abrogated *Auer*'s predicates and rendered what remains of the original deference a problematic anomaly. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012) (holding that *Auer* is applicable to an agency's "interpretation of ambiguous regulations [that would] impose

potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation was announced"); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 63-64 (2011) (indicating that *Auer* proscribes agencies from issuing what effectively amounts to a new regulation); *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* is applicable where the regulation simply paraphrases the statute); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (holding that *Auer* is applicable where the agency's regulation is unambiguous).

Moreover, *Auer* and *Seminole Rock* themselves are relatively recent aberrations in the historical trajectory of judicial deference. *See, e.g., Decatur v. Paulding*, 39 U.S. 497, 515 (1840) (Marshall, C.J.); Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 294 (2014) (stating that the early Supreme Court's "lack of deference" to the Executive meant that "[t]he judges had to defer to the law, not the Executive's interpretation"). Erasing these anomalies will enhance the interests of continuity and stability in the law and thus the interests of *stare decisis* itself. *See Janus*, 138 S.Ct. at 2483-84. Otherwise, *stare decisis* would become an empty talisman reflexively attached to the latest authoritative judicial pronouncement, a canon decoupled from the very interests it is supposed to advance.

Third, a precedent receives weak *stare decisis* effect when: It is a constitutional (instead of statutory) case, *see Agostini v. Felton*, 521 U.S. 203, 235 (1997); it addresses the evidentiary and procedural rules facing stakeholders, not their

primary conduct engendering reliance and expectancy, *see Pearson*, 555 U.S. at 233-34; *Payne*, 501 U.S. at 828; or it is just an interpretive tool, *see Pearson*, 555 U.S. at 233-34. Because *Seminole Rock* and *Auer* deference is a constitutional matter involving the separation of powers, does "not affect the way in which parties order their affairs," and is only a tool of judicial construction, it is not entitled to *stare decisis* effect. *Id.*

Fourth, this Court most vigilantly enforces the Constitution's structural protections, including by invalidating unconstitutional practices—whether they be longstanding, *see Chadha*, 462 U.S. at 959, or of recent vintage, *see Plaut*, 514 U.S. at 240; *United States v. Lopez*, 514 U.S. 549, 551, 567-68 (1995)—because otherwise our entire constitutional structure would unravel. The Court should so enforce again here.

The most illustrative example of judicial engagement to enforce our separation of powers is *Chadha*, where this Court struck down the line-item veto practice. 462 U.S. at 959. Despite the fact that more than 200 statutes across a wide array of policy areas over at least five decades had deployed this practice, the Court held that the practice violated the Constitution's structural requirements of bicameralism and presentment. *Chadha*, 462 U.S. at 967-68 (White, J., dissenting). Nor did concern for the extraordinary "Hobson's choice" Congress would face—either having to over-delegate to the Executive or having to enact detailed statutes—deter the *Chadha* Court. *Id.* The alterations on which the *Chadha* Court insisted in response to the

Constitution's structural fortifications were necessary and worthwhile.

The structural mischief *Auer* deference induces is similar, in many respects, to the shortcut the *Chadha* Court ended. In both cases, the enforcement by this Court of the structural provisions contained in the Constitution was essential because the character of our entire federal government and the preservation of core individual liberty are imperiled when the powers are hopelessly commingled. Accordingly, this Court should restore its coordinate branches to their proper preserves by jettisoning *Seminole Rock* and *Auer* deference.

CONCLUSION

For the reasons stated in this brief and by petitioner, this Court should overrule *Seminole Rock* and *Auer*, and the judgment of the Court of Appeals for the Federal Circuit should be reversed.

Respectfully submitted,

WILLIAM J. BROWN, JR.
Counsel of Record
BROWN WEGNER LLP
2010 MAIN STREET, SUITE 1260
Irvine, California 92614
bill@brownwegner.com
(949) 705-0080

Counsel for Amici Curiae
Stephen C. Connaker and The Military & Veterans' Law Institute

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,
Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE JEREMY C. DOERRE IN SUPPORT OF PETITIONER

Jeremy Cooper Doerre
Counsel of Record
Tillman Wright, PLLC
11325 N. Community
House Rd., Suite 250
Charlotte, NC 28277
jdoerre@ti-law.com
(704) 248-4883

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iv
INTEREST OF AMICUS CURIAE 1
SUMMARY OF THE ARGUMENT 1
ARGUMENT 6

I. If doctrinal judicial deference to agency interpretations of legislative statutes or regulations "undermines [the judicial branch's] obligation to provide a judicial check on the other branches," then it cannot be justified simply as a judicial choice to defer to agency expertise, and instead must be justified based on agency exercise of executive, judicial, or legislative power. 6

II. Doctrinal judicial deference to agency interpretations of legislative statutes or regulations cannot be justified based on agency exercise of judicial power 9

A. It is not clear that Congress has the authority to assign binding judicial interpretive power to administrative agencies. 9

B. Even assuming *arguendo* that Congress has the authority to assign binding judicial interpretive power to administrative agencies, Congress has chosen not to do so,

instead explicitly prescribing that a "reviewing court shall ... interpret ... statutory provisions, and determine the meaning ... of the terms of an agency action." 10

III. While judicial deference to an agency interpretation of a legislative statute or regulation can be justified based on agency exercise of delegated legislative power, the current doctrine of broad *Auer* deference cannot. 12

A. Granting *Chevron* deference to agency interpretations of statutes can be, and has been, justified based on agency exercise of delegated legislative power. 12

B. Granting broad *Auer* deference to agency interpretations of an agency regulation cannot be justified based on agency exercise of delegated legislative power. ... 14

i. Even assuming *arguendo* that legislative intent may properly be considered in interpreting a regulation, broad Auer deference cannot be justified based on agency "special insight into its intent when" it exercised its delegated legislative power to promulgate a regulation 16

a. Broad *Auer* deference has been applied where there was clearly no "special insight into [agency] intent,"

and where agency intent appears to have changed..... 19

b. Subsequent agency views regarding a prior regulation enacted with delegated legislative power should be given no more deference than subsequent congressional views regarding a prior statute enacted with that same legislative power. . 20

ii. Broad *Auer* deference cannot be justified based on subsequent agency "exercise of delegated lawmaking powers... [to] lawmak[e] by interpretation" because it allows post hoc agency interpretations to have retroactive effect even where Congress did not delegate legislative "power to promulgate retroactive rules." 23

CONCLUSION..... 31

TABLE OF AUTHORITIES

Cases

Auer v. Robbins,
519 U.S. 452 (1997) ..... 1, *passim*

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 5, 23, 25-26, 29-30

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... 1, 3, 6, 27-28, *passim*

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) ..... 12-13, *passim*

Christensen v. Harris Cty.,
529 U.S. 576 (2000) 3, 6

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 27-29

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,
447 U.S. 102 (1980) 21

Decker v. Northwest Environmental Defense Center,
568 U.S. 597 (2013) 3, 15-20, 28

Gonzales v. Oregon,
546 U.S. 243 (2006) 3, 6, 15-18

Gose v. U.S. Postal Serv.,
451 F.3d 831 (Fed. Cir. 2006)..... 3, 6, 28, 31

INS v. Chadha,
462 U. S. 919 (1983) 2, 8

Long Island Care at Home, Ltd. v. Coke,
551 U. S. 158 (2007) 4, 20, 22

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S. 144 (1991) 5, 14, 16, 23-27, 30

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 5, 24-25

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 4, 19

Perez v. Mortgage Bankers Assn.,
135 S. Ct. 1199 (2015) 2, 4, 6-10, 17, 20-22

Plaut v. Spendthrift Farm, Inc.,
514 U. S. 211 (1995) 7

Public Employees Retirement System of Ohio v. Betts,
492 U.S. 158 (1989) 4, 21-22

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 5, 24-26, 30

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 27

Talk America, Inc. v. Michigan Bell Telephone Co.,
564 U.S. 50 (2011) 28

United States v. Mead Corp.,
533 U.S. 218 (2001) 27

United States v. Mine Workers,
330 U.S. 258 (1947) 4, 22

United States v. Price,
361 U.S. 304 (1960) 21

Zuni Public School Dist. No. 89 v. Department of Education,
550 U. S. 81 (2007) 17

Statutes

5 U.S.C. § 551 ..... 11, 29
5 U.S.C. § 701 11
5 U.S.C. § 706 .....3, 10-11, 13, *passim*

Other Authorities

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 38 Duke L.J. 511 (1989) 14-15

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Jeremy C. Doerre is an attorney who believes that judicial review is an important check on administrative agency action. Amicus has no stake in any party or in the outcome of this case.

SUMMARY OF THE ARGUMENT

Petitioner asks whether this Court should overrule *Auer v. Robbins*[2] and *Bowles v. Seminole Rock & Sand Co.*[3]

As Justice Thomas has urged, judicial deference to agency interpretations of regulations may be "constitutionally questionable ... [because it]

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae or amicus curiae's counsel made such a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief. A copy of written consent from the Petitioner was provided to the Clerk upon filing. Respondent has filed a paper providing blanket consent for filing of amicus briefs.

[2] *Auer v. Robbins*, 519 U.S. 452 (1997).

[3] *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

undermines the judicial 'check' on the political branches."[4] If this is so, and doctrinal judicial deference to agency interpretations of regulations "undermines [the judicial branch's] obligation to provide a judicial check on the other branches,"[5] then such doctrinal deference cannot be justified simply as a judicial choice to defer to agency expertise, and instead, regardless of any potential policy advantages, must be justified based on agency exercise of constitutional power.[6]

However, doctrinal judicial deference to agency interpretations of regulations cannot be justified based on agency exercise of judicial power, because even assuming *arguendo* that Congress has the authority to assign binding judicial interpretive power to administrative agencies, Congress has chosen not to do so, instead explicitly prescribing in the Administrative Procedure Act (APA) that a "reviewing court shall ... interpret ... statutory provisions, and

---

[4] *Perez v. Mortgage Bankers Assn.*, 135 S. Ct. 1199, 1220 (2015) (Thomas, J., concurring in the judgment).

[5] *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

[6] See *INS v. Chadha*, 462 U. S. 919, 945 (1983) ("policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out . . . how those powers are to be exercised.")

determine the meaning ... of the terms of an agency action."[7]

Further, while judicial deference to an agency interpretation of a legislative statute or regulation can potentially be justified based on agency exercise of delegated legislative power, the current doctrine of broad *Auer* deference, under which the Federal Circuit felt compelled to "defer to an agency's interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation,'"[8] cannot.

As a first matter, even assuming *arguendo* that legislative intent may properly be considered in interpreting a regulation, broad *Auer* deference cannot be justified based on agency "special insight into its intent when"[9] it exercised its delegated legislative power to promulgate a regulation. This is the case because such deference has been applied even where there was clearly no special insight into agency

---

[7] 5 U.S.C. § 706.

[8] Pet. App. 15a (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006) (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); *Seminole Rock*, 325 U.S. at 413–414)).

[9] *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part).

intent,[10] and even where agency intent appears to have changed.[11] This is also the case because subsequent agency views regarding a prior regulation enacted with delegated legislative power should be given no more deference than subsequent congressional views regarding a prior statute enacted with that same legislative power.[12]

---

[10] See *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) ("This Court has afforded *Seminole Rock* deference to agency interpretations even when the agency was not the original drafter." (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–698 (1991))).

[11] See *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) ("[This Court] has likewise granted *Seminole Rock* deference to agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of the regulations." (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U. S. 158, 170–171 (2007))).

[12] See, e.g., *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989) ("We have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."); *United States v. Mine Workers*, 330 U.S. 258, 281 (1947) (Views "expressed eleven years after the Act was passed [] cannot be accorded even the same weight as if made by the same individuals in the course of the Norris-LaGuardia debates.")

Further, broad *Auer* deference cannot be justified based on subsequent agency "exercise of delegated lawmaking powers... [to] lawmak[e] by interpretation,"[13] as it allows post hoc agency interpretations proffered during adjudication to have retroactive effect even where they cannot represent an "exercise of delegated lawmaking powers"[14] "consistent with the authority granted by Congress"[15] because Congress did not delegate legislative "power to promulgate retroactive rules."[16]

Accordingly, if broad *Auer* deference cannot be justified simply as a judicial choice to defer to agency expertise, and cannot be justified based on agency exercise of judicial or legislative power, Amicus would urge that this Court overrule the current doctrine of broad *Auer* deference under which the Federal Circuit felt compelled to "defer to [the VA's] interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither

---

[13] *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 154 (1991) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 201-203 (1947)).

[14] *Martin*, 499 U.S. at 154.

[15] *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947).

[16] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

plainly erroneous nor inconsistent with the regulation.'"[17]

ARGUMENT

I. If doctrinal judicial deference to agency interpretations of legislative statutes or regulations "undermines [the judicial branch's] obligation to provide a judicial check on the other branches,"[18] then it cannot be justified simply as a judicial choice to defer to agency expertise, and instead must be justified based on agency exercise of executive, judicial, or legislative power.

"[T]he 'essential balance' of the Constitution is that the Legislature is 'possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of '[t]he

---

[17] Pet. App. 15a (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006) (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); *Seminole Rock*, 325 U.S. at 413–414)).

[18] *Perez v. Mortgage Bankers Assn.*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment).

interpretation of the laws' [it] 'the proper and peculiar province of the courts.'"[19]

This judicial power of "'[t]he interpretation of the laws'"[20] allows the judicial branch to "provide a judicial check on the other branches."[21]

As Justice Thomas has urged,[22] judicial deference to agency interpretations may be "constitutionally questionable ... [because it] undermines the judicial 'check' on the political branches."[23] If this is so, and doctrinal judicial deference to agency interpretations of legislative statutes or regulations "undermines [the judicial branch's] obligation to provide a judicial check on the other branches,"[24] then such doctrinal

---

[19] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U. S. 211, 222 (1995) (citation omitted; third brackets added)).

[20] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (quoting *Plaut*, 514 U. S. at 222 (citation omitted)).

[21] *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

[22] In the context of judicial deference to agency interpretations of regulations.

[23] *Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring in the judgment).

[24] *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

deference cannot be justified simply as a judicial choice to defer to agency expertise.

Instead, because "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out . . . how those powers are to be exercised,"[25] any doctrine of judicial deference to agency interpretations of statutes or regulations must be justified based on identifiable constitutional power assigned to an agency.

In this regard, "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[26] This Court has indicated that "[a]lthough not 'hermetically' sealed from one another, ... the powers delegated to the three Branches are functionally identifiable."[27] In accord with this, any constitutional power exercised by an agency justifying judicial deference to agency interpretations of a statute or regulation should be identifiable as legislative, executive, or judicial in nature.

---

[25] *INS v. Chadha*, 462 U. S. 919, 945 (1983); see also *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) (quoting *Chadha*, 462 U. S. at 945).

[26] *Chadha*, 462 U.S. at 951.

[27] *Chadha*, 462 U.S. at 951.

Overall, if doctrinal judicial deference to agency interpretations of legislative statutes or regulations "undermines [the judicial branch's] obligation to provide a judicial check on the other branches,"[28] then it cannot be justified simply as a judicial choice to defer to agency expertise, and instead must be justified based on agency exercise of executive, judicial, or legislative power.

II. Doctrinal judicial deference to agency interpretations of legislative statutes or regulations cannot be justified based on agency exercise of judicial power.

Turning first to judicial power, Amicus respectfully submits that a doctrine of judicial deference to agency interpretations of legislative statutes or regulations cannot be justified based on agency exercise of judicial power.

A. It is not clear that Congress has the authority to assign binding judicial interpretive power to administrative agencies.

In this regard, Justice Thomas has observed that "the Constitution does not empower Congress to issue

---

[28] *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

a judicially binding interpretation of the Constitution or its laws," and urged that "[l]acking the power itself, [Congress] cannot delegate that power to an agency."[29] Thus, it is questionable whether Congress has the authority to assign binding judicial interpretive power to administrative agencies.

B. Even assuming *arguendo* that Congress has the authority to assign binding judicial interpretive power to administrative agencies, Congress has chosen not to do so, instead explicitly prescribing that a "reviewing court shall ... interpret ... statutory provisions, and determine the meaning ... of the terms of an agency action."[30]

Notably, however, it is not even necessary to reach this issue in addressing the present matter, as even assuming *arguendo* that Congress has the authority to assign binding judicial interpretive power to administrative agencies, it is still clear that Congress has chosen not to do so.

This can be clearly seen in that far from attempting to assign binding judicial interpretive power to administrative agencies, Congress has

---

[29] *Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring in the judgment).

[30] 5 U.S.C. § 706.

instead explicitly prescribed that a "reviewing court shall ... interpret ... statutory provisions, and determine the meaning ... of the terms of an agency action."[31]

In this regard, an "agency action" includes an agency regulation or rule, as it is defined to "include[] the whole or a part of an agency rule."[32]

Thus, doctrinal judicial deference to agency interpretations of legislative statutes or regulations cannot be justified based on agency exercise of judicial power at least because, even assuming *arguendo* that Congress has the authority to assign binding judicial interpretive power to administrative agencies, Congress has chosen not to do so,[33] instead explicitly prescribing that a "reviewing court shall ... interpret ... statutory provisions, and determine the meaning ... of the terms of an agency [rule]."[34]

---

[31] 5 U.S.C. § 706.

[32] 5 U.S.C. § 551(13); see 5 U.S.C. § 701(b) ("For the purpose of this chapter... 'person', 'rule', 'order', 'license', 'sanction', 'relief', and 'agency action' have the meanings given them by section 551 of this title.")

[33] Notably, this was not as clear at the time that this Court decided *Seminole Rock*, as that decision predated enactment of the Administrative Procedure Act.

[34] 5 U.S.C. § 706; see 5 U.S.C. § 551(13); see also 5 U.S.C. § 701(b).

III. While judicial deference to an agency interpretation of a legislative statute or regulation can be justified based on agency exercise of delegated legislative power, the current doctrine of broad *Auer* deference cannot.

Turning to legislative power, it is necessary to differentiate between judicial deference to an agency's interpretations of Congressional statutes, and judicial deference to an agency's interpretations of its own regulations or rules. In this regard, although the issue of *Chevron* deference is not currently before this Court, it is useful to briefly discuss it for contextual and contrastive purposes.

A. Granting *Chevron* deference to agency interpretations of statutes can be, and has been, justified based on agency exercise of delegated legislative power.

In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,[35] this Court discussed delegation of legislative authority to an administrative agency, noting that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of

---

[35] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

authority to the agency to elucidate a specific provision of the statute by regulation."[36] This Court indicated that "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[37]

This Court further observed that "[s]ometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit," and held that such an implicit delegation of legislative power to an agency still requires that its regulations be given controlling weight such that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[38]

Thus, although the APA commands that a "reviewing court shall ... interpret ... statutory provisions, and determine the meaning ... of the terms of an agency action,"[39] *Chevron* deference to agency interpretation of statutes via promulgated regulations can be, and has been, justified based on agency exercise of delegated legislative power to promulgate such regulations.

---

[36] *Chevron*, 467 U.S. at 843-844.

[37] *Chevron*, 467 U.S. at 844.

[38] *Chevron*, 467 U.S. at 844.

[39] 5 U.S.C. § 706.

B. Granting broad *Auer* deference to agency interpretations of an agency regulation cannot be justified based on agency exercise of delegated legislative power.

It has been suggested that, just as *Chevron* deference to agency interpretations can be justified based on agency exercise of delegated legislative power, "power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[40] Considering this proposition requires considering possible rationales therefore.

It has been observed, in considering judicial deference to administrative interpretations, that "[a]n ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency."[41]

---

[40] *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991).

[41] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 38 Duke L.J. 511, 516 (1989). Justice Scalia further observed that "the pre-*Chevron* decisions sought to choose between (1) and (2) on a statute-by-statute basis," but that "*Chevron*... replaced this statute-by-statute evaluation ... with an across-the-

Analogously, "[a]n ambiguity in a [regulation] ... can be attributed to either of two [agency] desires: (1) [the agency] intended a particular result, but was not clear about it; or (2) [the agency] had no particular intent on the subject, but meant to leave its resolution to the agency"[42] in the future.

In the first situation, where an agency "intended a particular result, but was not clear about it,"[43] it is possible "that the agency, as the drafter of the rule, will have some special insight into its intent when enacting it."[44] It has been suggested that an agency has "special authority to interpret its own words"[45] based on such "special insight into its intent when"[46] it exercised its delegated legislative power.

In the second situation, however, where the agency "had no particular intent on the subject, but meant to leave its resolution to the agency"[47] in the future, any

---

board presumption that, in the case of ambiguity, agency discretion is meant." *Id.*

[42] Scalia, *supra* at 516.

[43] Scalia, *supra* at 516.

[44] *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part).

[45] *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

[46] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[47] Scalia, *supra* at 516.

agency "special authority to interpret its own words"[48] cannot be based on "special insight into its intent when"[49] previously exercising delegated legislative power. Instead, any "power authoritatively to interpret its own regulations [that represents] a component of the agency's delegated lawmaking powers"[50] could only be based on agency exercise of delegated legislative power to legislate a new rule, e.g. "the exercise of delegated lawmaking powers... [to] lawmak[e] by interpretation."[51]

i. **Even assuming *arguendo* that legislative intent may properly be considered in interpreting a regulation, broad *Auer* deference cannot be justified based on agency "special insight into its intent when"[52] it exercised its delegated legislative power to promulgate a regulation.**

---

[48] *Gonzales*, 546 U.S. at 257.

[49] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[50] *Martin*, 499 U.S. at 151.

[51] *Martin*, 499 U.S. at 154.

[52] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

As outlined above, it has been suggested that an agency has "special authority to interpret its own words"[53] based on "special insight into its intent when"[54] it exercised its delegated legislative power to promulgate a regulation.

As a first matter, it is worth noting that there is a legitimate question as to whether, and if so to what extent, a legislator's intent should be taken into consideration in interpreting a legislative statute or regulation.

In this regard, it has been observed that "[c]itizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated,"[55] and that "'[t]o be governed by legislated text rather than legislators' intentions is what it means to be 'a Government of laws, not of men.'"[56] In accord with this, it has been suggested that "'[W]e do not inquire what the legislature meant; we ask only what the statute

---

[53] *Gonzales*, 546 U.S. at 257.

[54] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[55] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (quoting *Zuni Public School Dist. No. 89 v. Department of Education*, 550 U. S. 81, 119 (2007) (Scalia, J., dissenting)).

[56] *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) (quoting *Zuni*, 550 U. S. at 119 (Scalia, J., dissenting)).

means,'"[57] and that "[w]hether governing rules are made by the National Legislature or an administrative agency, we are bound by what they say, not by the unexpressed intention of those who made them."[58]

Based on this, it has been suggested that with respect to any argument that an agency has "special authority to interpret its own words"[59] based on such "special insight into its intent when"[60] it exercised its delegated legislative power, "[t]he implied premise of this argument--that what we are looking for is the agency's intent in adopting the rule--is false."[61]

However, even assuming *arguendo* that legislative intent may properly be considered in interpreting a regulation, the current doctrine of broad *Auer* deference still cannot be justified based on agency "special insight into its intent when"[62] it exercised its delegated legislative power to promulgate a regulation.

---

[57] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[58] *Id.*

[59] *Gonzales*, 546 U.S. at 257.

[60] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[61] *Id.*

[62] *Id.*

a. Broad *Auer* deference has been applied where there was clearly no "special insight into [agency] intent,"[63] and where agency intent appears to have changed.

As has been observed by Justice Thomas, with respect to such a justification for deference based on agency "special insight into its intent"[64] when drafting a regulation, "[t]his justification rings hollow[] [because] [t]his Court has afforded *Seminole Rock* deference to agency interpretations even when the agency was not the original drafter."[65] In particular, this Court "appl[ied] *Seminole Rock* deference to one agency's interpretation of another agency's regulations because Congress had delegated authority to both to administer the program."[66] Thus, broad

---

[63] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[64] *Id.*

[65] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–698 (1991)).

[66] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment).

Auer deference has been applied even where there was clearly no "special insight into [agency] intent."[67]

Further, broad *Auer* deference has been applied where intent appears to have changed in that this Court "has likewise granted *Seminole Rock* deference to agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of the regulations."[68]

Thus, broad *Auer* deference cannot be justified simply based on agency "special insight into its intent when"[69] it exercised its delegated legislative power to promulgate a regulation because such deference has been applied even where there was clearly no "special insight into [agency] intent,"[70] and even where agency intent appears to have changed.

b. Subsequent agency views regarding a prior regulation enacted with delegated legislative power should be given no more deference than

---

[67] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[68] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U. S. 158, 170–171 (2007)).

[69] *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part).

[70] *Id.*

subsequent congressional views regarding a prior statute enacted with that same legislative power.

Further, "[e]ven if the scope of *Seminole Rock* deference more closely matched the original-drafter justification, it would still fail."[71]

In this regard, this Court has cautioned that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'," [72] and has "observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."[73]

Given that this Court declines to grant controlling weight to the views of a later Congress regarding a statute passed by a prior Congress exercising its legislative power, this same legislative power cannot possibly justify granting controlling weight to the views of a subsequent administration regarding a

---

[71] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment).

[72] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

[73] *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989).

regulation enacted by a prior administration pursuant to this delegated legislative power.

This Court has suggested that granting controlling weight to subsequently expressed views is inappropriate even when the same individuals are involved, suggesting in one instance that views "expressed eleven years after the Act was passed [] cannot be accorded even the same weight as if made by the same individuals in the course of [prior] debates."[74]

Here, just as "the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute,"[75] a subsequent interpretation given by an agency to an earlier regulation is of little assistance in discerning the meaning of that regulation. And yet, *Auer* deference has been granted to "agency interpretations that are inconsistent with interpretations adopted closer in time to the promulgation of [] regulations."[76]

Overall, if this Court declines to grant controlling weight to subsequent congressional views regarding a

---

[74] *United States v. Mine Workers*, 330 U.S. 258, 281 (1947).

[75] *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989).

[76] *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) (citing *Long Island Care*, 551 U. S. at 170–171).

statute passed by Congress exercising its legislative power, this same legislative power cannot possibly justify granting controlling weight to the subsequent views of an agency regarding a regulation enacted exercising this delegated legislative power.

That is, even assuming *arguendo* that legislative intent may properly be considered in interpreting a regulation, subsequent agency views regarding a prior regulation enacted with delegated legislative power should be given no more deference than subsequent congressional views regarding a prior statute enacted with that same legislative power.

ii. Broad *Auer* deference cannot be justified based on subsequent agency "exercise of delegated lawmaking powers... [to] lawmak[e] by interpretation"[77] because it allows post hoc agency interpretations to have retroactive effect even where Congress did not delegate legislative "power to promulgate retroactive rules."[78]

Further, a conclusion that an agency has "power authoritatively to interpret its own regulations [as] a

---

[77] *Martin*, 499 U.S. at 154.

[78] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

component of the agency's delegated lawmaking powers"[79] cannot be based on agency exercise of delegated legislative power to legislate a new rule, e.g. "the exercise of delegated lawmaking powers... [during adjudication to] lawmak[e] by interpretation."[80]

This Court has indicated that agency "adjudication operates as an appropriate mechanism not only for factfinding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation."[81]

Notably, however, this Court has made clear that such "lawmaking by interpretation"[82] during adjudication is a "permissible mode of lawmaking and policymaking only because the unitary agencies in question also had been delegated the power to make law and policy through rulemaking,"[83] and is permissible only when it is "consistent with the authority granted by Congress."[84]

---

[79] *Martin*, 499 U.S. at 151.

[80] *Martin*, 499 U.S. at 154.

[81] *Martin*, 499 U.S. at 154 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 201-203 (1947)).

[82] *Martin*, 499 U.S. at 154.

[83] *Martin*, 499 U.S. at 154 (citing *Bell Aerospace*, 416 U.S. at 292-294 (1974); *Chenery*, 332 U.S. at 202-203).

[84] *Chenery*, 332 U.S. at 207.

In this regard, this Court has indicated that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[85] As "lawmaking by interpretation"[86] during adjudication is a "permissible mode of lawmaking and policymaking only because the [] agencies ... ha[ve] been delegated the power to make law and policy through rulemaking,"[87] if an agency lacks the "power to promulgate retroactive rules,"[88] then any "exercise of delegated lawmaking powers [during adjudication], including lawmaking by interpretation,"[89] is similarly limited.

Consequently, while an agency may arrive at a new interpretation during adjudication that represents a proper "lawmaking by interpretation,"[90] absent agency "power to promulgate retroactive

---

[85] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[86] *Martin*, 499 U.S. at 154.

[87] *Martin*, 499 U.S. at 154 (citing *Bell Aerospace*, 416 U.S. at 292-294 (1974); *Chenery*, 332 U.S. at 202-203).

[88] *Bowen*, 488 U.S. at 208.

[89] *Martin*, 499 U.S. at 154 (citing *Bell Aerospace*, 416 U.S. at 292-294; *Chenery*, 332 U.S. at 201-203).

[90] *Martin*, 499 U.S. at 154.

rules,"[91] such new interpretation is only effective as an exercise of delegated legislative power prospectively, and cannot be relied on retroactively to justify an agency conclusion in the adjudication.

The agency might still base a conclusion in the adjudication on that interpretation, but for purposes of retroactive application in such adjudication, that interpretation would not represent an "exercise of delegated lawmaking powers"[92] "consistent with the authority granted by Congress"[93] if the agency does not have the "power to promulgate retroactive rules."[94] Any attempt by the agency to justify its decision based on retroactive application of such newly pronounced rule would be improper, as retroactive application of the newly announced rule would not be "consistent with the authority granted by Congress."[95]

Instead, for purposes of that proceeding, and judicial review thereof, the newly announced interpretation should be granted "a measure of deference proportional to the ' 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements,

---

[91] *Bowen*, 488 U.S. at 208.

[92] *Martin*, 499 U.S. at 154.

[93] *Chenery*, 332 U.S. at 207.

[94] *Bowen*, 488 U.S. at 208.

[95] *Chenery*, 332 U.S. at 207.

and all those factors which give it power to persuade.'"[96] In subsequent proceedings, where retroactive application is not at issue, it may properly be considered as a rule representing an "exercise of delegated lawmaking powers."[97]

This is in accord with this Court's observation in *Christopher v. SmithKline Beecham Corp.* that "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an [adjudicatory] proceeding and demands deference."[98]

Importantly, this Court in *Seminole Rock* was not faced with such potential problems posed by post hoc interpretations, as this Court looked to "a bulletin issued by the Administrator concurrently with [a] Regulation"[99] in order to determine the administrative interpretation of that regulation. In

---

[96] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

[97] *Martin*, 499 U.S. at 154.

[98] *Christopher*, 567 U.S. at 158-159.

[99] *Seminole Rock*, 325 U.S. at 417.

the seventy plus years since, however, this Court's suggestion in *Seminole Rock* that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"[100] has evolved into a doctrine of broad *Auer* deference under which a court "will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[101]

In *Christopher v. SmithKline Beecham Corp.*, this Court noted the problem that post hoc interpretations can "'frustrat[e] the notice and predictability purposes of rulemaking,'"[102] but rather than having occasion to address "the general merits of *Auer* deference,"[103]

---

[100] *Seminole Rock*, 325 U.S. at 414.

[101] *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (quoting *Seminole Rock*, 325 U.S. at 414); see also Pet. App. 15a ("we defer to an agency's interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation.'" (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006)).

[102] *Christopher*, 567 U.S. at 158 (quoting *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

[103] *Christopher*, 567 U.S. at 159.

simply found "*Auer* deference... [to be] unwarranted here."[104]

Amicus respectfully submits, however, that this narrow exception suggests reason to question the broader doctrine. In particular, broad *Auer* deference allows post hoc agency interpretations proffered during adjudication to have retroactive effect even where Congress did not delegate legislative power to promulgate retroactive rules.[105] In this regard, post

---

[104] *Christopher*, 567 U.S. at 159.

[105] Relatedly, Amicus would suggest that broad *Auer* deference risks sanctioning use of post hoc agency interpretations proffered during adjudication as retroactive rules, risking undermining the APA's setup under which "'[r]ulemaking is agency action which regulates the future conduct of either groups of persons or a single person,'" while "'[c]onversely, adjudication is concerned with the determination of past and present rights and liabilities.'" *Bowen*, 488 U.S. at 218-219 (Scalia, J., concurring) (quoting 1947 Attorney General's Manual on the Administrative Procedure Act, 13-14). "The first part of the APA's definition of 'rule' states that a rule 'means the whole or a part of an agency statement of general or particular applicability *and future effect* ...,' [and] [t]he only plausible reading of the italicized phrase is that rules have legal consequences only for the future." *Bowen*, 488 U.S. at 216 (Scalia, J., concurring) (quoting 5 U.S.C. § 551(4)). Even assuming *arguendo* that retroactive rulemaking may sometimes be proper, broad judicial sanctioning risks undermining the APA, as "'[t]he entire

hoc agency interpretations proffered during adjudication cannot represent an "exercise of delegated lawmaking powers"[106] "consistent with the authority granted by Congress"[107] where Congress did not delegate legislative "power to promulgate retroactive rules."[108]

Thus, broad *Auer* deference cannot be justified based on subsequent agency "exercise of delegated lawmaking powers... [to] lawmak[e] by interpretation,"[109] as it allows post hoc agency interpretations proffered during adjudication to have retroactive effect even where they cannot represent an "exercise of delegated lawmaking powers"[110] "consistent with the authority granted by Congress"[111] because Congress did not delegate legislative "power to promulgate retroactive rules."[112]

Act is based upon [this] dichotomy between rulemaking and adjudication.'" *Bowen*, 488 U.S. at 218-219 (Scalia, J., concurring) (quoting 1947 Attorney General's Manual on the Administrative Procedure Act, 13-14).

[106] *Martin*, 499 U.S. at 154.

[107] *Chenery*, 332 U.S. at 207.

[108] *Bowen*, 488 U.S. at 208.

[109] *Martin*, 499 U.S. at 154.

[110] *Martin*, 499 U.S. at 154.

[111] *Chenery*, 332 U.S. at 207.

[112] *Bowen*, 488 U.S. at 208.

CONCLUSION

Amicus urges this Court to overrule the current doctrine of broad *Auer* deference under which the Federal Circuit felt compelled to "defer to [the VA's] interpretation of its own regulation 'as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation.'"[113]

Respectfully submitted,

Jeremy Cooper Doerre
Counsel of Record
Tillman Wright, PLLC
11325 N. Community
House Rd., Suite 250
Charlotte, NC 28277
jdoerre@ti-law.com
(704) 248-4883

Counsel for Amicus Curiae

January 2019

---

[113] Pet. App. 15a (quoting *Gose*, 451 F.3d at 836).

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,
Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMICUS CURIAE BRIEF OF SERGEANT MAJOR JEFF S. HOWARD (RETIRED) IN SUPPORT OF PETITIONER

David C. McDonald
Cody J. Wisniewski
Mountain States Legal Found.
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
dmcdonald@mountainstateslegal.com
cody@mountianstateslegal.com

Shawn T. Welch
Counsel of Record
Holland & Hart LLP
222 South Main, Suite 2200
Salt Lake City, UT 84101
(801) 799-5889
stwelch@hollandhart.com

January 31, 2019

Attorneys for Amicus Curiae

QUESTION PRESENTED

Whether the deference afforded to agencies in *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled and replaced with actual judicial review over agencies' interpretations of their own regulations.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

I. HISTORICAL BACKGROUND 3

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY 3

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. VETERAN SERVICES OFFICER SGT. MJR. HOWARD'S (RET.) EXPERIENCE WITH AGENCY VAGARIES 9

II. PROBLEMATIC AGENCY BEHAVIOR ENCOURAGED BY *AUER* DEFERENCE ... 13

III. THE PERVASIVE IMPACT OF *AUER* 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Auer v. Robbins,
519 U.S. 452 (1997) ..... Passim

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 2, 3, 25

Carter v. Welles-Bowen Realty, Inc.,
736 F.3d 722 (6th Cir. 2013) 15

Connally v. General Const. Co.,
269 U.S. 385 (1926) 24

Foster v. Vilsack,
820 F.3d 330 (8th Cir. 2016) 15, 22

Hudgens v. McDonald,
823 F.3d 630 (Fed. Cir. 2016) 22

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 23

Pauly v. Bethenergy Mines, Inc.,
501 U.S. 680 (1991) 22

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015) 17

Sessions v. Dimaya,
138 S.Ct. 1204 (2018) 24

Skilling v. United States,
561 U.S. 358 (2010) 24

Vietnam Veterans of Am. v. Central Intel. Agency,
811 F.3d 1068 (9th Cir. 2015) 22

Yates v. United States,
135 S. Ct. 1074 (2015) 24

REGULATIONS

38 C.F.R. § 3.156(c) 6, 7

38 C.F.R. § 3.156(c)(1) 6, 7, 17, 18

38 C.F.R. § 3.156(c)(3) 6

38 C.F.R. § 4.71a 10

38 C.F.R. § 4.71a(5054) 11

VA Claims and Appeals Modernization,
84 Fed. Reg. 138-01 (Jan. 18, 2019) 18

OTHER AUTHORITIES

Christopher J. Walker, *Inside Agency Statutory Interpretation*,
67 Stan L. Rev. 999 (2015) 16, 24

Description of Medals, Department of Defense 13

THE FEDERALIST No. 1 (Alexander Hamilton) (C. Rossiter ed., 1961) 14

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*,
96 Colum. L. Rev. 612 (1996) 13

LON L. FULLER, THE MORALITY OF LAW (1964) 19

Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*,
92 Cornell L. Rev. 397 (2007) 20

Restatement (Second) of Contracts, § 206 ..... 22, 23

Richard Fallon, *'The Rule of Law' as a Concept in Constitutional Discourse*,
97 Colum. L. Rev. 1 (1997) 14

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*,
10 Admin. L.J. Am. U. 1 (1996) 13

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Army Sergeant Major Jeff S. Howard, retired ("SGM Howard"), is a combat veteran who gave his country nearly 26 years of dedicated service. From his time in basic training, to serving as the Department of the Army Inspector General Sergeant Major at the Pentagon, SGM Howard has been unwavering in his loyalty both to this nation and to those who have served their country in the armed forces. After retiring from active duty, SGM Howard continued to serve his fellow servicemembers by volunteering his time as a Veteran Service Officer ("VSO") for the American Legion and for Adams County, Idaho. As a VSO, SGM Howard assisted veterans with applying for disability services and compensation from the U.S. Department of Veterans Affairs ("VA") for service-connected injuries and disabilities. A substantial portion of SGM Howard's duties included laboring over the rules and regulations set forth by the VA, to ensure veterans' benefits were assigned and dispersed appropriately. SGM Howard is all too aware of the effect *Auer*

---

[1] The parties have consented to the filing of this amicus curiae brief. *See* Supreme Court Rule 37.3(a). Additionally, pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or his counsel has made a monetary contribution specifically for the preparation or submission of this brief.

deference[2] has on those veterans trying to make sense of the VA's ambiguous regulations—the meaning of which the VA can change on a whim.

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been involved in numerous cases seeking to protect Americans' constitutional and civil liberties, as well as numerous cases seeking to ensure a limited and ethical government that allows individuals to practically and confidently act without unreasonable government action infringing on their individual rights. Because *Auer* deference is a direct threat to limited and ethical government and Americans' constitutional and civil liberties, MSLF respectfully submits this amicus curiae brief in support of Petitioner on behalf of Army Sergeant Major Jeff S. Howard (Retired).

---

[2] The doctrine of *Auer* deference, as set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), was, in part, first established in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). For the convenience of this Court, *amicus* will simply refer to this doctrine as *Auer* deference for the remainder of this brief.

STATEMENT OF THE CASE

I. Historical Background

In 1945, this Court decided the case of *Bowles v. Seminole Rock & Sand Co.*, and in doing so, established a precedent that would have incalculable ramifications for decades to come. 325 U.S. 410 (1945). In that case, this Court stated that, when evaluating an agency's interpretation of its own regulations, the interpretation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414.

This Court then reaffirmed its deference to agencies in 1997, in the case of *Auer v. Robbins*. 519 U.S. 452 (1997). When examining a Department of Labor regulation, this Court reasoned that "[b]ecause the . . . test is a creature of the Secretary's own regulation," the Secretary's interpretation of that regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Id.* at 461 (citations and quotations omitted). This Court inevitably found that this "deferential standard [was] easily met . . .." *Id.*

This deferential standard has become commonly known as *Seminole Rock* or *Auer* deference. Such deference led to the events of this case.

II. Factual Background and Procedural History

James L. Kisor honorably served his country with the United States Marine Corps from 1963 to 1966. Pet. App. 2a. While serving his country Mr. Kisor was deployed to Vietnam, and specifically

participated in Operation Harvest Moon. Pet. App. 3a. Operation Harvest Moon was a particularly brutal conflict between the U.S. Armed Forces and the Viet Cong. Pet. App. 3a, n.1. Mr. Kisor's company came under direct attack and endured several contacts from sniper and mortar fire. Pet. App. 3a. Mr. Kisor was also directly affected by an ambush of his company, which resulted in the death of 13 of his fellow soldiers. Pet. App. 3a; J.A. 11, 21. Mr. Kisor was awarded a U.S. Marine Corps "Combat Action Ribbon," for his service in Vietnam. J.A. 25. All in all, it is understandable that Mr. Kisor's time while deployed in Vietnam left an unforgettable mark upon him.[3]

In 1982, Mr. Kisor filed an initial claim ("1982 Claim") with the VA Regional Office ("RO") in Portland, Oregon for disability compensation benefits due to Post-Traumatic Stress Disorder ("PTSD"). Pet. App. 2a–3a; J.A. 6–9. In 1983, Mr. Kisor underwent a psychiatric examination to evaluate his claim. Pet. App. 3a; J.A. 10–14. The examiner determined that Mr. Kisor did not suffer from PTSD, but rather diagnosed Mr. Kisor with intermittent explosive disorder and atypical personality disorder—neither of which can be the basis of a service-based disability compensation. Pet. App. 3a; J.A. 13. In May 1983,

---

[3] "Additionally, during Operation Harvest Moon, when the Viet Cong ambushed my battalion in the village of Ky Phu, I was with H&S Company in the open paddies west of the hamlet and under a hail of incoming fire. It was then that I personally killed 2 Viet Cong snipers with my M14 rifle as their heads emerged from spider traps. This fact has tormented me during the past 41+ years." J.A. 25 (excerpt from Mr. Kisor's letter to Acting Regional Director Craig Moore of August 24, 2007).

because Mr. Kisor was not diagnosed with PTSD, the RO denied Mr. Kisor's claim, which denial became final after Mr. Kisor appealed, but failed to perfect his appeal. Pet. App. 3a; J.A. 15.

In June 2006, Mr. Kisor submitted a request to reopen his 1982 Claim with the RO. Pet. App. 4a; J.A. 16–17. Thereafter, Mr. Kisor submitted additional evidence to the RO while his request was pending (J.A. 23–26)—a July 2007 report of a psychiatric evaluation diagnosing Mr. Kisor with PTSD (J.A. 28–40); a copy of Mr. Kisor's Combat Action Ribbon Award (J.A. 27); a copy of the Official U.S. Marine Corps "After Action Report" regarding Operation Harvest Moon (J.A. 24); and a number of other, relevant documents. *See* Pet. App. 4a. In September 2007, a VA examiner formally diagnosed Mr. Kisor with PTSD, making a "Formal Finding of Information Required to Document the Claimed Stressor." Pet. App. 4a; J.A. 41–44. The RO reopened Mr. Kisor's claim, granted him a service connection for PTSD, and assigned a fifty-percent disability rating from June 5, 2006. Pet. App. 4a; J.A. 41–43. Mr. Kisor filed a Notice of Disagreement with the RO in March 2009, challenging the percent rating, and importantly, the effective date assigned to Mr. Kisor's claim. Pet. App. 5a; J.A. 45–49. The RO, in January 2010, denied Mr. Kisor's entitlement to an earlier effective date. Pet. App. 5a–6a.

Mr. Kisor appealed the RO's effective date determination to the Board of Veterans' Appeals ("Board"). Pet. App. 6a. Specifically, Mr. Kisor requested that his claim's effective date relate back to his original 1982 Claim date, not to the reopening in

2006. Pet. App. 6a. The Board rejected Mr. Kisor's arguments, but suggested that Mr. Kisor may be able to proceed under 38 C.F.R. § 3.156(c). This regulation provides that, "at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim . . .." 38 C.F.R. § 3.156(c)(1). If proceeding under this section, the VA can alter the effective date of the entitlement to "the date the entitlement arose or the date the VA received the previously decided claim, whichever is later . . .." 38 C.F.R. § 3.156(c)(3).

The Board, applying 38 C.F.R. § 3.156(c) still found that Mr. Kisor was not entitled to an earlier effective date. Pet. App. 8a. The reason? According to the Board's interpretation, the newly submitted documents were not "relevant" as contemplated by 38 C.F.R. § 3.156(c). Pet. App. 8a. The Board found that the reason for the denial of Mr. Kisor's 1982 Claim was that there was no specific finding that Mr. Kisor suffered from PTSD and that the newly submitted documents did not establish that Mr. Kisor had PTSD at the time of the original claim. Pet. App. 8a–9a. Mr. Kisor appealed this decision to the Veterans Court, which found that Mr. Kisor "failed to demonstrate error in the Board's findings that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD." Pet. App. 25a.

Mr. Kisor then appealed to the United States Court of Appeals for the Federal Circuit. Pet. App. 10a. Mr. Kisor challenged, *inter alia*, the Board's

interpretation of 38 C.F.R. § 3.156(c). Pet. App. 10a. The Federal Circuit, however, was hamstrung in its review of the Board's interpretation—"As a general rule, we defer to an agency's interpretation of its own regulation as long as the regulation is ambiguous and the agency's interpretation is neither plainly erroneous nor inconsistent with the regulation." Pet. App. 14a–15a (citations and quotations omitted). The Federal Circuit ultimately determined that 38 C.F.R. § 3.156(c)(1) was "ambiguous as to the meaning of the term 'relevant,'" and that the "Board's interpretation [of the term 'relevant'] does not strike [the Court] as either plainly erroneous or inconsistent with the VA's regulatory framework." Pet. App. 15a, 17a. Based on those determinations, the Federal Circuit found no error in the Board's interpretation of 38 C.F.R. § 3.156(c) and affirmed the Veterans Court's affirmation of the Board's decision to deny Mr. Kisor an effective date earlier than June 2006. Pet. App. 19a.

SUMMARY OF THE ARGUMENT

This case is about whether this Court should overturn its holdings in *Bowles v. Seminole Rock & Sand Co.* and *Auer v. Robbins*. But this case is also about James Kisor, a Vietnam veteran suffering from PTSD who has been made to suffer further by a Veterans Administration that refuses to speak clearly until hauled into court. It is paramount that, while in the midst of this very important legal debate over the scope of an agency's power to authoritatively interpret its own ambiguous regulations, we do not lose sight of

the very real harms that *Auer* deference continues to inflict on ordinary men and women across the country.

This brief highlights the experiences of Sergeant Major Jeff S. Howard (ret.)—a long-time former VSO and decorated veteran in his own right—who has encountered first hand the impact *Auer* has on our nation's veterans. SGM Howard worked with the VA for years to help wounded veterans obtain the medical benefits they are entitled to, and faced a never-ending series of obstacles caused by the deference doctrine: unpredictable and seemingly arbitrary changes in VA interpretations of ambiguous terms, vague, nearly incomprehensible regulatory provisions, and a severe lack of communication from VA officials.

Auer deference's negative impact on agency behavior is clear. Courts' reflexive deference to agency interpretations of their own regulations, even when the agency's proffered interpretation is far from the most natural or reasonable one, incentivizes agency officials to use this interpretive power as an end-run around formal policy-making. If they draft their regulations vaguely enough, then the regulations' meaning can be flexibly reinterpreted whenever politically convenient, without the hassle, delay, and expense of notice-and-comment rulemaking. And while this may be an efficient way of doing business for agency officials, it can be extremely destructive to the ordinary citizens attempting to navigate what is already a complex and confusing web of regulation. *Auer* and *Seminole Rock* deserve be overturned solely due to their legal defects, but the harm they have inflicted—and continue to inflict—on everyday Americans should never be far from our minds.

ARGUMENT

I. VETERAN SERVICES OFFICER SGT. MJR. HOWARD'S (RET.) EXPERIENCE WITH AGENCY VAGARIES

Throughout his 12 years as a VSO, SGM Howard had a front row seat to the tragic human consequences of *Auer* deference. His clients' struggles to obtain the medical care and benefits they deserved brought SGM Howard face-to-face with exactly the sort of agency behavior that critics of *Auer* deference have long railed against—arbitrarily shifting interpretations of regulations between different officials and at different times, vague and nearly incomprehensible regulations, and lack of proper notice of what is required under the regulations.

SGM Howard, upon becoming a VSO for both the local American Legion and Adams County, Idaho, was trained in the process of submitting claims to the VA. SGM Howard attended an annual training, organized by the VA and all of the major veterans' services organizations, comprising of 30 hours of in-depth, intensive instruction. This was the only time that VSO's, like SGM Howard, were ever able to interact directly with VA raters (the initial reviewing party on veterans' claims) and Decision Review Officers (the second-level review of veterans' claims)—even then, the interaction was often limited to lecture and limited questions. During his 12 years as a VSO, and his nearly 360 hours of training, the only time SGM Howard was explicitly informed that the VA was

changing its interpretation of a VA regulation was when the VA was forced by the courts to recognize that Agent Orange could cause ischemic heart disease for the purposes of disability benefits. What follows are a mere handful of examples from SGM Howard's career as a VSO.

SGM Howard faced near-constant roadblocks caused by vaguely drafted regulations. It was rarely clear what the requirements for having a claim approved were or what evidence was necessary for meeting those requirements. Often, each VA official SGM Howard interacted with had a different interpretation of the regulatory provision at issue, causing wildly different outcomes for similar claims with the exact same or near-identical evidence.

For example, one of SGM Howard's clients had previously been given a ten percent disability rating due to a service-related hip injury. Over the course of two years the injury became progressively worse, so he and SGM Howard submitted a rating increase request. SGM Howard presented X-rays of the veteran's hip and other evidence showing the injury had caused grinding bone-on-bone contact—worth a twenty percent disability rating, according to 38 C.F.R § 4.71a—but the claim was denied. They refiled with additional information but were denied again. Taking the regulation at its word, and not understanding the denial, they filed a third time with the veteran's doctor's recommendation for hip replacement surgery. Despite not hearing back from the VA, the veteran had run out of time and elected to go through with the surgery without VA support. Immediately after the surgery, SGM Howard resubmitted the claim with the

same evidence and, at the same time, submitted a claim for a temporary one hundred percent rating immediately following hip replacement surgery, as set forth in 38 C.F.R. § 4.71a(5054). Confusingly, the VA rater granted the veteran a temporary one hundred percent disability rating but once again denied the original rate increase—despite both claims being based on the exact same injury and evidence. Dumbfounded by the VA's determination, SGM Howard appealed the decision, on behalf of the veteran, to a Decision Review Officer ("DRO"), again, using the exact same evidence. This time, the original request that had previously been denied four times was quickly granted. It was never clear to SGM Howard or the veteran what evidence was required to satisfy the VA. The DRO came to a completely different conclusion than the rater using the exact same evidence (doing so in a fraction of the amount of time the rater took to deny the claim three times), and the raters themselves were inconsistent in their treatment of the evidence pre-and-post-surgery. It took over eight months for the veteran's claim to ultimately be approved. The VA backdated the twenty percent disability rating to the original claim date.

Vague regulations—and the wildly inconsistent interpretations from VA officials that result—were the root cause of many of the frustrations SGM Howard faced as a VSO, but even common terms that seemed clear to ordinary citizens could become sources of ambiguity in the hands of VA raters and DROs. And even as a highly trained VSO, it was extremely frustrating to point directly to what appears to be perfectly clear language in the CFR only for a rater or DRO to "interpret" the clear meaning

right out of it. Imagine what it would be like if you were approaching the regulations as a layman.

For example, another of SGM Howard's clients was a Vietnam War veteran who had suffered significant hearing loss during his service as an artilleryman. Despite the evidence presented—and a 105mm howitzer's propensity to cause hearing damage among those operating them—the VA's rater denied the veteran's claim. The rater used the fact that the veteran owned and regularly fired a .22 caliber rifle to declare that the hearing loss occurred after the veteran's service. The DRO agreed with this assessment on appeal, and it took SGM Howard showing a judge a picture of the veteran cradling a 105mm howitzer round and handing the Veterans Court judge a live .22 round to compare the two to finally get someone to see reason and approve the veteran's claim. Apart from this courtroom demonstration, absolutely no new evidence was presented. It was two-and-a-half years before SGM Howard was even able to stand before the judge. Yet again, recognizing the rater's and DRO's error, the judge backdated the benefits to the original claim date.

A third client attempted to file a claim for service-related PTSD—much like Mr. Kisor in the present litigation—and was denied due to lack of evidence of sufficient "stressors" known to cause PTSD. This was despite the fact that this veteran was a door gunner who saw service in Vietnam, and despite the fact that the veteran had been awarded the Silver Star for gallantry in action. The Silver Star is the third-highest military combat decoration that

can be awarded to a member of the United States Armed Forces, awarded for personal gallantry "above those required for all other U.S. combat decorations" other than the Medal of Honor or a Service Cross. *Description of Medals*, Department of Defense, https://valor.defense.gov/description-of-awards/ (last visited Jan. 28, 2019). Presented with the exact same evidence, a DRO almost immediately reversed the rater's decision, but the claim still took over a year to be approved.

II. PROBLEMATIC AGENCY BEHAVIOR ENCOURAGED BY *AUER* DEFERENCE

We do not recount SGM Howard's story to this Court merely to highlight the shortcomings of the VA; the issue at hand is much more consequential. SGM Howard's story perfectly encapsulates how the near-complete agency deference set out by this Court in *Auer v. Robbins* harms those whom the agencies are supposed to help. The difficulties faced by SGM Howard and the veterans with whom he worked—confusing and vague regulatory language, ever-shifting requirements that seemed to change at a whim, and opaque processes that kept important information secret from applicants for benefits—are precisely the sorts of problems critics of *Auer* and *Seminole Rock* have been warning about for decades. *See generally*, Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1 (1996); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

A. Shifting Interpretations

One of the foremost goals of any legal system, and America's in particular, is to ensure regularity and predictability in the law. *See* Richard Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7–8 (1997) ("First the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.") In fact, that is the primary benefit to codifying laws in the first place: writing them down provides certainty and guidance, allowing the governed to view and comprehend the principles by which they are bound. *See* THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that Americans had the opportunity to be the first nation to "establish [] good government from reflection and choice, [rather than being] forever destined to depend for their political constitutions on accident and force").

In an ideal system, any reasonably literate person would be able to look up a statute or regulation, read it, maybe peruse a court case or academic article to learn about the nuance and context of the language in question, and comprehend what the government is requiring of them. *Auer* deference turns that ideal on its head. *Auer* deference allows federal agencies, such as the VA, to effectively re-write their regulations on a whim under the guise of informal "interpretation." Citizens subjected to agency authority, therefore, need be knowledgeable

not only of the relevant federal statutes and regulations at play in order to understand their rights and obligations, but must also be familiar with every internal memorandum, field manual, and training document that may touch on the same topic—some of which were never formally published or even made available to the public. *See, e.g., Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016) (endorsing interpretation of environmental regulation found in internal agency field circular under *Auer* deference). Under *Auer*, "[a]ny government lawyer with a laptop could create a new federal crime by adding a footnote to a friend-of-the-court brief." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring).

This is the chief *Auer* issue SGM Howard experienced as a VSO. Whether helping veterans whose hearing had been damaged by artillery, attempting to obtain coverage for hip surgery, or getting support for a Silver Star honoree suffering from PTSD, the VA's vague regulations all but ensured that different VA officials would interpret and apply their own regulations inconsistently. As demonstrated *supra*, on any given day, a rater would deny a claim that a DRO would approve—despite those claims being identical. Occasionally, it would take the veterans court to interpret the regulation differently than the rater or DRO to allow SGM Howard to successfully get benefits for a suffering veteran. These situations were not an aberration, but rather colored the entirety of SGM Howard's career as a VSO. Imagine attempting to navigate this system without someone as experienced, educated, and dedicated as SGM Howard.

The shifting sands that SGM Howard had to traverse are not merely the end-user effect of a lack of communication from VA employees, as one can see in many large organizations, but rather are the direct and foreseeable result of a doctrine of near-complete judicial deference that, in effect, encourages agencies to repeatedly change the meanings of their regulations as convenience requires, so as to avoid the messy and time-consuming process of revising them the appropriate way through notice-and-comment rulemaking (or even better, through the long-lost art of Congressional legislation).

If for no other reason than providing for some level of certainty in the interpretation of agency regulations, this Court should overturn the precedent of agency deference as established in both *Auer* and *Seminole Rock*.

B. Vague Regulations

As if the ever-changing nature of the VA's and other agencies' regulation was not enough, *Auer* deference has resulted in the even more insidious practice of agencies intentionally drafting ambiguous regulations. When surveyed, two in five agency officials whose job duties include rule-drafting confirmed that "*Auer* deference plays a role in drafting" their regulations. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN L. REV. 999, 1066 (2015). Allowing agencies to reinterpret their ambiguous rules at will, with no need for formal review processes, incentivizes them to write vague regulations—to ensure the widest range of potential meanings. As Justice Scalia—the author of *Auer v. Robbins*—observed in 2015, "giving [informal

agency interpretations] deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment).

As illustrated above in Part I, *supra*, this is no mere academic concern. The vagueness with which the VA writes its regulations makes it extremely difficult for even experienced professionals, such as SGM Howard, to parse the meaning of eligibility criteria, claim reconsideration, rating percentages, and countless other VA regulations. When it comes to the many veterans who do not have the good fortune to have someone like SGM Howard in their corner, the prospect can seem hopeless.

To take an additional example, just look at the relevant regulatory language in the case at bar. The present controversy centers around the meaning of 38 C.F.R. § 3.156(c)(1), which, at the time this case was filed, read, in part:

> Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section . . . .

Even if you are able to parse the stilted and convoluted language of this section (which is representative of the surrounding sections as well) in general, the regulations provide no indication of what the term "relevant" is supposed to mean in this context. Indeed, nowhere in the regulation or previous provisions is there a definition of the term 'relevant.' Pet. App. 15a–7a. The Federal Circuit below was at a loss for what § 3.156's drafters meant by that term, stating in its denial of rehearing *en banc* that "[b]oth parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable. We thus conclude that the term 'relevant' in § 3.156(c)(1) is ambiguous." *Id.* at 17a. In its Congressionally mandated amendment to the section at issue in this case earlier this year, even the VA itself has acknowledged that the language is unnecessarily unclear. *See* VA Claims and Appeals Modernization, 84 Fed. Reg. 138-01(Jan. 18, 2019) ("these implementing regulations provide *much-needed comprehensive reform* for the legacy administrative appeals process . . . .") (emphasis added). If trained lawyers and judges, as well as the United States Congress *and VA officials themselves*, are incapable of supplying definite meaning to the VA's words, what hope does the average citizen have?

In his 12 years as a VSO, SGM Howard assisted at least 300 to 400 veterans and attended approximately 360 hours of formal training in how to navigate the VA claims process. Despite this extensive training and experience, he still struggled with interpreting VA regulations. As illustrated in Part I, *supra*, getting a meritorious claim approved could easily require two or three separate rounds of

applications (regardless of whether additional evidence was needed or not) and an appeal, often taking well over a year. If trained and highly skilled professionals such as SGM Howard often need two, three, or even more bites at the apple to finally have the VA get it right, something has clearly gone very wrong.

While certainly not this Court's intent, the deference given to agencies under both *Seminole Rock* and *Auer* encourage federal agencies to promulgate these vague and unintelligible regulations so that they may swoop in with any interpretation for their regulations that serves the agencies' best interest, so long as that interpretation is not "erroneous or inconsistent." This Court should reverse its precedent set forth in both *Seminole Rock* and *Auer* in order to correct this injustice.

C. Lack of Notice

It is a fundamental maxim of American law that, in order to be legitimate, the law must be reasonably knowable to an ordinary person. *See* LON L. FULLER, THE MORALITY OF LAW 33–38 (1964) (arguing that lack of public promulgation and reasonable intelligibility are two of the "eight ways to fail to make law"). A properly formulated law must provide fair warning of the conduct prescribed or proscribed to those who may be subject to the law's requirements. These are not merely guidelines for good public administration; they are bedrock characteristics of the very concept of law. *Id.* The *Auer* doctrine contradicts this principle.

As evidenced by SGM Howard's experience with being unable to obtain information or guidance from VA raters or DROs outside of annual training events,

the VA, just like numerous other federal agencies, has almost completely abandoned the basic concept of providing citizens with adequate notice of what the citizens' legal rights and obligations are. How can one trust that the system has the answers when it is impossible to even access the system in order to ask the question? Given that it is extremely difficult to pass any legislation through Congress, and notice-and-comment rulemaking is a long and time-consuming process that can require sifting through hundreds or thousands of public comments, agencies have come to rely more and more on internal memoranda and expedient reinterpretations of old statutes and regulations in order to achieve their policy goals. Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398–99 (2007) (noting the shift from formal rulemakings to the use of informal guidance manuals as the primary tools of agency policy-making. "A recent study of the Food and Drug Administration . . . suggests that on average it issues at least twice as many guidances as it does rules."). What the agencies have relied on as a clever method to pass pseudo-legislation, in reality, is an insidious work around to the basic notice requirements that underly our legal system. The efficient accomplishment of a particular administration or official's policy goals should not take precedence over the fundamental right to due process of law.

The veterans SGM Howard assisted were expected to navigate a complex series of rules, requirements, and definitions that were not only mostly unknown to them, but in some cases may have been entirely *unknowable* ahead of time. The use of

informal, internal documents rather than formal rules, combined with the firewall the VA has put up between its officials and VSOs, means that veterans are forced to go into the claims process half blind, leading to the significant delays reported by SGM Howard while additional evidence that could have been requested earlier is obtained, and appeals are filed. Not only was SGM Howard not provided with the VA's interpretations of their own regulations, aside from one occasion, he was never notified when those interpretations changed. Essentially, the VA asked SGM Howard, and the veterans he worked on behalf of, to play the game without knowing the rules and reserved the right to change the rules whenever it felt like it.

This Court's goal of allowing agencies an inch in the administration of their own regulations has resulted in the agencies taking a mile to intentionally draft ambiguous regulations, alter their interpretations as they see fit, and fail to ever provide all those subject to the regulations any information about their actual meanings. This Court's precedent, as established in *Seminole Rock* and *Auer*, though well-intentioned, has resulted in an affront to the basic principles of our legal system and should be overturned.

III. THE PERVASIVE IMPACT OF *AUER*

The purpose of this *amicus* brief has been to illuminate the harmful impacts of *Auer* deference on veterans attempting to obtain the benefits to which they are entitled; to show how the arguments Mr. Kisor is advancing before this Court will improve the lives of countless veterans, and to illustrate how even

experienced professionals have trouble navigating the tangle of vague and convoluted VA regulations this Court's *Auer* deference doctrine has allowed to metastasize.

The problem of *Auer* deference, however, extends beyond the halls of the VA to most, if not all, other federal agencies, and the struggles faced by Mr. Kisor and SGM Howard, while notable, are far from unique. *Auer* permits the Department of Labor to withhold benefits from sick coal miners, despite a Congressional authorization to do so. *See Pauly v. Bethenergy Mines, Inc.*, 501 U.S. 680 (1991). It allows the Department of Agriculture to declare family farms protected wetlands based on only the weakest of pretenses. *See Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016). And of course, it allows the VA to deny veterans needed health services. *See* Part I, *supra*. *C.f. Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016) (refusing to apply *Auer* deference to decision denying veteran partial knee replacement); *Vietnam Veterans of America v. Central Intelligence Agency*, 811 F.3d 1068 (9th Cir. 2015) (refusing to apply *Auer* deference to decision denying coverage for injuries resulting from chemical and biological weapons experiments on soldiers). And most people and small businesses forced to deal with administrative agencies do not have a free regulatory-guide like SGM Howard available to assist them.

There is a reason that, when a court is asked to interpret an ambiguous term in a contract, the general rule is that the ambiguous term is interpreted in the light most favorable to the non-drafting party. *Restatement (Second) of Contracts*, § 206 ("In choosing among the reasonable meanings of a promise or

agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."). The comments to Section 206 of the *Restatement (Second) of Contracts* provides a good summary of the rationale:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. *Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert.* In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party. The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position, but it is not limited to such cases.

Id. (emphasis added). Contracts, of course, are not regulations, but the situations are analogous. There is no reason why the general rule for interpretation of private contracts should be flipped on its head whenever a federal agency of the United States government—which enjoys possibly the strongest bargaining position possible—happens to be the drafting party. The malincentives identified by the American Law Institute—and, indeed, by this Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62–63 (1995) ("Respondents drafted an

ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.")—are equally apparent in the *Auer* context. Indeed, *Auer* deference makes less sense the wider one's perspective becomes. The common-law rule of lenity commands that ambiguities in criminal statutes be interpreted in favor of the defendant. *See Yates v. United States*, 135 S. Ct. 1074, 1088 (2015); *Skilling v. United States*, 561 U.S. 358, 410–11 (2010). This Court's void for vagueness doctrine stands for the proposition that ambiguities in criminal statutes can be enough to invalidate the statutes on First Amendment grounds. *See Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018); *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926). For some reason, the only time when the general rule that ambiguities are resolved against the drafter seems not to be followed is within the *Auer* context.

This Court's doctrine of deference toward agencies interpreting their own regulations—under both *Auer* and *Seminole Rock*—causes real, significant harm to those at the receiving end of adverse vacillating agency interpretations. This is not merely an academic debate over the proper distribution of authority between branches of government, or an abstract concern over theoretical misbehavior. The application of *Auer* deference by courts changes agency behavior in measurable ways, *see* Walker, 67 STAN L. REV. at 1066, and SGM Howard's experiences with the VA illustrate how those changes in behavior translate into pain and suffering by America's veterans.

CONCLUSION

For the foregoing reasons, this Court should overturn its precedent as established in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) and *Auer v. Robbins*, 519 U.S. 452 (1997) and, accordingly, should reverse the judgment of the Court of Appeals.

Respectfully submitted,

Shawn T. Welch
Counsel of Record
Holland & Hart LLP
222 South Main, Suite 2200
Salt Lake City, UT 84101
(801) 799-5889
stwelch@hollandhart.com

David C. McDonald
Cody J. Wisniewski
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
dmcdonald@mountainstateslegal.com
cody@mountainstateslegal.com
Counsel for Amicus Curiae

January 31, 2019

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF FOR PROFESSOR THOMAS MERRILL AS AMICUS CURIAE SUPPORTING REVERSAL

THOMAS W. MERRILL
435 W. 116th Street
New York, NY 10027

WILLIAM M. JAY
Counsel of Record
LEVI W. SWANK
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Amicus Curiae

January 31, 2019

TABLE OF CONTENTS

PAGE

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Court Has Never Considered Head-On Whether To Apply A Different Standard Of Review To An Agency's Interpretation Of Its Regulations. 6

II. Applying The Reasonableness Standard To Agency Interpretations Of Their Regulations Is Incompatible With The APA. 11

A. Section 706 11

1. *Chevron* is compatible with Section 706 12

2. The delegation argument does not work in the context of regulations rather than statutes. 14

B. Section 553 16

III. The Court Should Adopt The Persuasiveness Standard In Reviewing An Agency's Interpretation Of Its Own Regulations. 19

IV. *Stare Decisis* Is No Reason To Adhere To The Reasonableness Standard. 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. Robbins,
519 U.S. 452 (1997) 9, 23

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Brown v. United States,
113 U.S. 568 (1885) 22

Chase Bank USA, N.A. v. McCoy,
562 U.S. 195 (2011) 8

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris Cty.,
529 U.S. 576 (2000) 7, 8

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 10, 20

City of Arlington, Tex. v. FCC,
569 U.S. 290 (2013) 8

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,
557 U.S. 261 (2009) 9

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) ..... *passim*

Edward's Lessee v. Darby,
25 U.S. (12 Wheat.) 206 (1827) 21, 22

Gardebring v. Jenkins,
485 U.S. 415 (1988) 24

Gonzales v. Oregon,
546 U.S. 243 (2006) 10, 20

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999) 14

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 26

Maislin Indus. U.S., Inc. v. Primary Steel, Inc.,
497 U.S. 116 (1990) 2

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S. 144 (1991) 10

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 8

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015) ..... *passim*

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 8, 25

Shalala v. Guernsey Mem'l Hosp.,
514 U.S. 87 (1995) 25

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) ..... *passim*

Talk Am., Inc. v. Mich. Bell Tel. Co.,
564 U.S. 50 ..... 24, 25

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 9, 10, 23

Udall v. Tallman,
380 U.S. 1 (1965) 9

United States v. Haggar Apparel Co.,
526 U.S. 380 (1999) 15

United States v. Mead Corp.,
533 U.S. 218 (2001) 7, 8, 13

United States v. Moore,
95 U.S. 760 (1877) 22

United States v. Vowell,
9 U.S. (5 Cranch) 368 (1809) 21

United Student Aid Funds, Inc. v. Bible,
136 S. Ct. 1607 (2016) 26

Vt. Yankee Nuclear Power Corp. v. NRDC,
435 U.S. 519 (1978) 19

Statutes

5 U.S.C. § 551 (13) 12

5 U.S.C. § 553 ..... *passim*

5 U.S.C. § 706 ..... *passim*

5 U.S.C. § 706(2)(a) 13, 14

5 U.S.C. § 706(2)(e) 14

Other Authorities

Annotation, *Effect of Practical or Administrative Construction of Statute on Subsequent Judicial Construction*, 73 L. Ed. 322 (1929) 22

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1 (1996) 23

John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113 (1998) 13, 14

Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235 (2007) 21

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 19, 23, 24

Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002) 1

Thomas W. Merrill & Kristin Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (2001) 1

Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969 (1992) 1

Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-rules and Meta-Standards*, 54 Admin. L. Rev. 807 (2002) 1

Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727 (2008) 1

Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753 (2014) 1

Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449 (2011) 17

BRIEF FOR PROFESSOR THOMAS MERRILL AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE AMICUS CURIAE

Amicus curiae Thomas W. Merrill is the Charles Evans Hughes Professor at Columbia Law School.[1] He has devoted much of his professional life to practicing, teaching, and writing about administrative law. His scholarly interests in this regard have centered on when and how much weight courts should give administrative interpretations of law in different contexts.[2] He has filed or written several previous *amicus* briefs in the Court on these topics.[3] His

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae* or his counsel made a monetary contribution to the brief's preparation or submission.

[2] *See, e.g.*, Thomas W. Merrill, *Step Zero After* City of Arlington, 83 Fordham L. Rev. 753 (2014); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727 (2008); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807 (2002); Thomas W. Merrill & Kristin Hickman, Chevron's *Domain*, 89 Geo. L.J. 833 (2001); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969 (1992).

[3] Br. for the Nat'l Governors Ass'n et al. as Amici Curiae, *City of Arlington v. FCC*, Nos. 11-1545 & 11-1547; Br. for the Nat'l Governors Ass'n et al. as Amici Curiae, *Cuomo v. Clearing House Assn., L.L.C.*, No. 08-453; Br. for Ctr. for State Enforcement of Antitrust & Consumer Protection Laws as Amicus Curiae, *Wyeth v. Levine*, No. 06-1249; Br. for Ctr. for State En-

experience is also informed by his service as Deputy Solicitor General of the United States from 1987-1990, including in cases where agencies sought deference to their legal interpretations. *See, e.g.*, *Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-36 (1990).

This brief is submitted in the hope that it will assist the Court in resolving the question presented.

SUMMARY OF ARGUMENT

I. This Court has never collectively deliberated about what standard of review should apply to an administrative agency's interpretation of its own regulation. Instead, starting with *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), the Court has assumed, without extensive analysis, that a highly deferential standard should apply in the regulatory-interpretation context—that a court should ask only whether the agency's interpretation is one that a reasonable interpreter could adopt.

In contrast, the Court has given extensive consideration to the proper weight to give agency interpretations of statutes they administer. In the statutory-interpretation context, the Court has identified three applicable standards: (i) *de novo* review (giving no weight to the agency interpretation); (ii) a standard, associated with *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), that gives weight to an agency interpretation to the extent it has the "power to per-

---

forcement of Antitrust & Consumer Protection Laws as Amicus Curiae, *Watters v. Wachovia Bank, N.A.*, No. 05-1342; Br. for Prof. Thomas W. Merrill as Amicus Curiae, *United States v. Mead Corp.*, No. 99-1434.

suade"; and (iii) a standard, associated with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), that defers to the agency interpretation if it is a reasonable one, even if not the one the court thinks is best.

II. The selection of a standard of review should begin with the Administrative Procedure Act (APA). The APA, in Section 706, instructs reviewing courts to "decide all relevant questions of law," including "the meaning" of any applicable agency regulation. 5 U.S.C. § 706. That provision is difficult to square with the reasonableness (*Seminole Rock*) standard that courts currently apply.

Although agency interpretations of *statutes* receive deference under *Chevron*, even in APA litigation, that does not establish that deference is *per se* consistent with Section 706. Rather, *Chevron* comports with Section 706 for particular reasons that do not carry over to the regulatory-interpretation context. *Chevron* applies only when Congress vests an agency with primary interpretive authority. When Congress both creates a gap or ambiguity in a statute *and* delegates authority to the responsible agency to act with the force of law (through legislative regulations or binding adjudicatory decisions), Congress presumptively intends that the agency have primary authority to fill the gap or resolve the ambiguity. Thus, a reviewing Court "decide[s]" under the APA that Congress has delegated primary interpretive authority to the agency, and defers to the agency accordingly.

But this implied-delegation rationale does not apply to an agency's interpretation of its regulations.

Congress delegates to agencies the authority *to write* regulations; it generally does not separately delegate authority *to interpret* those regulations in an informal format that lacks the force of law. Deferring to an agency's informal interpretation of its regulations therefore is difficult if not impossible to reconcile with Section 706's prescription that a reviewing court should "decide all relevant questions of law."

The structure of the APA also indicates that courts should review informal agency interpretations of their own regulations for more than just reasonableness. The APA, in Section 553, carefully differentiates between the required procedure to issue a regulation having the force of law (a legislative rule) and the procedure to issue an interpretative rule. Legislative rules must ordinarily undergo exposure to the public through notice-and-comment rulemaking. Interpretative rules, in contrast, are exempt from this requirement. One consequence is that legislative regulations are binding on courts and regulated parties, whereas interpretative regulations are not. As a corollary, legislative regulations are entitled to strong *Chevron*-style deference, whereas interpretative regulations (insofar as they interpret statutes) are not. The *Seminole Rock* standard of review for administrative interpretations of regulations upsets this careful balance by affording near-controlling weight to administrative interpretations of regulation that are exempt from careful scrutiny and public oversight either *ex ante* (when they are promulgated) or *ex post* (when they are reviewed).

III. The persuasiveness standard associated with *Skidmore* strikes the appropriate balance for this

context. Neither *Chevron*'s reasonableness standard nor pure *de novo* review is suitable.

The persuasiveness standard pre-dates the APA, and Congress was certainly aware of the practice of giving some weight to persuasive agency interpretations. The persuasiveness standard also comports with the policy rationales of Section 553, given that agencies would now feel compelled to give supporting reasons when adopting an interpretation of a regulation, and those reasons would be subject to examination on judicial review. Furthermore, the persuasiveness standard would mitigate the infirmities individual Justices and commentators have identified with the use of the highly deferential *Seminole Rock* standard, including the temptation to "enact mush" and then clarify it with an interpretative regulation. On the other side of the ledger, the persuasiveness standard would require reviewing courts to engage with and give respectful consideration to the agency's experience in implementing the statutory regime and familiarity with its own regulations, respect that *de novo* review would not require.

IV. *Stare decisis* does not compel adherence to the *Seminole Rock* standard. Many members of the Court have long signaled that *Seminole Rock* should be, at a minimum, reconsidered. Given that the Court has (until now) adhered to the highly deferential *Seminole Rock* standard without considering whether some other standard like *Skidmore*'s persuasiveness standard would be superior, it is not clear that jettisoning the *Seminole Rock* standard and adopting a persuasiveness standard would require overruling the outcome of any previous decision.

ARGUMENT

I. The Court Has Never Considered Head-On Whether To Apply A Different Standard Of Review To An Agency's Interpretation Of Its Regulations.

As a preliminary matter, it is appropriate to note that the Court has not in any decision given sustained consideration to what standard of review is appropriate in reviewing agency interpretations *of their regulations*, and why. By contrast, in reviewing agency interpretation *of statutes*, this Court has developed three standards of review: one that accepts any agency view that is reasonable, one that considers the agency's view respectfully but adopts it only if it is persuasive, and one that gives no weight to agency views. This Court has never squarely decided whether, as this brief argues, the persuasiveness standard (or *Skidmore* standard) should govern when a Court reviews agency interpretations of regulations.

In particular, the Court has not thoroughly explained why courts should accept any reasonable agency interpretation of a regulation. "The first case to apply [that view], *Seminole Rock*, offered no justification whatever—just [] ipse dixit." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part); *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring) (noting that "the Court announced" "the approach it would apply [in *Seminole Rock*]," "without citation or explanation"). And while subsequent cases have employed the standard articulated in *Seminole Rock* and offered

justifications for doing so, the Court has not, in any case, given careful consideration to whether applying a less deferential standard of review would be appropriate.

This is in sharp contrast to the question of the standard of review of agency interpretations of statutes, where the Court has considered the matter repeatedly and in depth. In that context, the Court has identified two standards of review that give some weight to an agency's interpretation. *See generally United States v. Mead Corp.*, 533 U.S. 218, 227-35 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576, 586-87 (2000). One standard that gives weight, which is associated with *Chevron*, 467 U.S. at 861-62, asks whether the agency interpretation is consistent with the text of the statute and is one that a reasonable interpreter might adopt, whether or not the court regards it as the best interpretation. The other standard that gives weight, which has come to be associated with *Skidmore*, 323 U.S. at 140, asks whether the agency interpretation is persuasive, given the thoroughness of the agency's consideration of the issue, whether the question draws upon the agency's expertise in the subject matter, the consistency with which the agency has maintained the interpretation, whether the interpretation is a post hoc rationalization developed in litigation, and other contextual factors. This brief refers to the *Chevron* standard as the "reasonableness standard" and the *Skidmore* standard as the "persuasiveness standard."

In the statutory-interpretation context, the Court has set a workable boundary between when the reasonableness standard applies and when the persuasiveness standard applies. The reasonableness

standard applies when Congress has delegated authority to an agency to act with the force of law to implement the statutory provision in question, *and* the agency has advanced its interpretation in the exercise of that delegated authority. *See generally City of Arlington, Tex. v. FCC*, 569 U.S. 290, 306 (2013); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Mead*, 533 U.S. at 227; *cf. Christensen*, 529 U.S. at 587. The critical determination is that Congress has delegated lawmaking authority to the agency with respect to the provision at issue, thereby signaling that it intends the agency, rather than the courts, to serve as the primary interpreter of that provision. If there is no such delegation from Congress to the agency, or if the agency does not exercise its lawmaking authority when it interprets the provision in question, then the persuasiveness standard generally applies when a court reviews the agency interpretation. *See Mead*, 533 U.S. at 237-38.

This reasoning does not carry over to the context of agency interpretations of regulations. The question in cases like this one is not whether the agency has the delegated power to write a regulation, but what the regulation means once it is written. And in deciding what weight to give the agency's own view in answering that question, this Court has simply assumed that the reasonableness standard is the appropriate default standard of review. *See, e.g., Decker*, 568 U.S. at 613; *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

Making matters even less clear, in some decisions the Court has nominally adhered to the reasonableness standard but has simultaneously invoked considerations more commonly associated with the persuasiveness standard. *See, e.g.*, *Decker*, 568 U.S. at 614 ("There is another reason to accord *Auer* deference to the EPA's interpretation: there is no indication that its current view is a change from prior practice or a post hoc justification adopted in response to litigation."); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 284 (2009) (holding that an internal agency memorandum was entitled to "a measure of deference" because it was "a reasonable interpretation of the regulatory scheme" based on an evaluation of five aspects of the interpretation); *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (stating that the agency interpretation was not a post hoc rationalization and there was "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (stating that "an agency's interpretation of a * * * regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view").

In none of these decisions has the Court offered a reasoned explanation for why a standard of reasonableness should be the general default standard as opposed to the persuasiveness standard or conceivably *de novo* review.[4] The Court has made clear that

---

[4] The Court's opinions have offered varying justifications for use of the reasonableness standard in the context of interpretations of regulations. *See, e.g.*, *Thomas Jefferson Univ.*, 512 U.S. at 512 ("[B]road deference is all the more warranted when, as

reasonableness cannot be the *exclusive* standard: For example, in *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012), the Court held that the reasonableness standard does not apply when parties have justifiably relied on a contrary, longstanding interpretation. The Court held that reliance interests warrant reviewing the agency's interpretation under a persuasiveness standard instead. *Id.* at 159 (quoting *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140)).[5] But the Court did not consider

---

here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) ("Because the Secretary promulgates these standards, the Secretary is in a better position * * * to reconstruct the purpose of the regulations in question."); *id.* at 151 ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."); *Perez*, 135 S. Ct. at 1224-25 (Thomas, J., concurring in the judgment) ("A final proposed justification for *Seminole Rock* deference is that too much oversight of administrative matters would imperil the 'independence and esteem' of judges." (citations omitted)); *see generally id.* at 1222-25 (critiquing these justifications). But the Court has never weighed the case for applying a reasonableness standard, as opposed to a persuasiveness standard, in this context.

[5] The Court made another exception in *Gonzales v. Oregon*, 546 U.S. 243 (2006), holding that the reasonableness standard does not apply when an agency is interpreting a regulation that simply "parrots" the language of the statute. The interpretation of such a regulation, the Court held, should be treated as if

whether the persuasiveness standard might be more appropriate across the board.

Now is the time to decide that question. This case gives the Court the opportunity to consider head-on the appropriate standard of review, as the question presented. *See Decker*, 568 U.S. at 616 (Roberts, J., concurring).

II. Applying The Reasonableness Standard To Agency Interpretations Of Their Regulations Is Incompatible With The APA.

The analysis properly begins with the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* Two features of the APA are especially relevant to the Court's analysis. One is Section 706, which expressly sets forth the standards courts are to apply in reviewing agency action and directs them to "determine the meaning" of that agency action themselves. The other is Section 553, the structure of which—with its different procedural requirements for legislative rules and what it calls "interpretative rules"—is inconsistent with the notion of giving strong deference to a interpretative document that is prepared behind closed doors without ever being subject to public input.

A. Section 706

The first sentence of Section 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and *determine the*

---

it were an interpretation of the statute, which will often mean applying a persuasiveness standard. *Id.* at 256-57, 268-69.

meaning or applicability of the terms of an agency action.

5 U.S.C. § 706 (emphasis added). "Agency action," for its part, is defined to include "the whole or part of an agency rule." 5 U.S.C. § 551(13). Thus, the emphasized language provides that it is the function of "the reviewing court" to "determine the meaning * * * of the terms of" an agency regulation. The question is whether a reviewing court can exercise this authority while giving weight to the views of the agency, and if so, how much weight and under what circumstances.

1. *Chevron* is compatible with Section 706.

Those seeking to reconcile reasonableness review with the APA have sometimes suggested that Section 706 cannot mean what it says, and that reasonableness review must be permissible, because the Court has accorded *Chevron* deference to agency interpretations of statutes even in cases reviewed under Section 706. That is not correct: *Chevron* (reasonableness review of agency interpretation of *statutes*) is compatible with Section 706 in a way that *Seminole Rock* (reasonableness review of agency interpretation of *regulations*) is not.

While the decision in *Chevron* itself did not harmonize its holding with Section 706, subsequent decisions have linked reasonableness review in the statutory interpretation context to Congress's delegation to the agency to implement the statute through directives having the force of law. *See Mead*, 533 U.S. at 226-27. If Congress delegates power to an agency to bind persons outside the agency by writing rules with the force of law, and if Con-

gress simultaneously leaves a gap or ambiguity in a statute the agency administers, then the agency in effect has been delegated authority to fill the gap or resolve the ambiguity. By giving the agency lawmaking authority and leaving a gap or ambiguity to resolve (the argument goes), Congress has signaled that the agency is to function as the primary interpreter of the gap or ambiguity by promulgating interpretations having the force of law. Thus, the court in these circumstances remains true to the APA's injunction to "decide all relevant questions of law" because it fairly interprets the relevant statute, typically the agency's organic statute, to mean that Congress intended the agency to fill gaps and ambiguities in the statute, provided it does so reasonably and with the force of law.

This argument carries the greatest weight when Congress has delegated authority to an agency to implement, carry out, or enforce a statutory provision with *regulations* having the force of law. If Congress delegates authority to an agency to issue so-called legislative regulations (*i.e.*, regulations that bind persons outside the agency, *Perez*, 135 S. Ct. at 1203), and through that delegation the agency resolves a gap or ambiguity in a provision of the statute, then the questions on judicial review of the regulation are whether the regulation violates the statute and, if not, whether it is otherwise arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(a). These two inquiries closely track the *Chevron* two-step. Hence, *Chevron*'s reasonableness standard of review can be derived from the nature of legislative rulemaking and the judicial-review provisions of the APA. *See* John F. Duffy, *Administrative Common*

Law in Judicial Review, 77 Tex. L. Rev. 113, 199-202 (1998).

A similar logic applies when Congress delegates authority to an agency to enforce a statutory regime through binding adjudications. If Congress delegates that authority to an agency, and the agency resolves a statutory gap or ambiguity in the course of an adjudication, then the question on judicial review of the adjudication would be whether the agency's decision violates the statute and, if not, whether it otherwise satisfies the substantial evidence standard of review (if applicable) or is otherwise arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(a),(e); *see, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999).

2. The delegation argument does not work in the context of regulations rather than statutes.

The implied-delegation rationale cannot justify the practice of deferring to any agency interpretation of a regulation so long as it is within the broad compass of "reasonableness." In that context, there is typically no statutory delegation that justifies deviating from Section 706's command that the reviewing court decide the meaning of the agency's action.

To be sure, if an agency interprets its own regulation in a format that (like the regulation itself) has the force of law, then the same argument about the exercise of delegated authority that justifies applying a reasonableness standard to the agency's interpretations of the statute would also apply to the agency's interpretation of its regulations. For example, if an agency clarifies a legislative rule with another legislative rule, the reasonableness standard should

apply in reviewing the second (clarifying) regulation just as it does in reviewing the first regulation. Similarly, if the agency clarifies a legislative rule in a formal adjudication that has binding effect, the reasonableness standard should apply to that interpretation.

But if the agency interprets its own regulation in a format that does not have the force of law—such as through an interpretative rule, a policy statement, an instruction manual, an opinion letter, an amicus brief, or, as in this case, an informal adjudication with no binding effect beyond the parties—the implied-delegation argument breaks down. This is because *all* agencies have authority to issue interpretative rules, policy statements, instruction manuals, opinion letters, and amicus briefs, even without specific statutory authority to fill gaps and make rules with the force of law. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 388 (1999) (observing that it is common "for agencies to give instructions or legal opinions to their officers and employees in one form or another, without intending to bind the public").

When an agency issues an interpretative rule (or other nonbinding pronouncement) that interprets one of its own regulations, there is no signal that Congress intended that the agency rather than the court should function as the primary interpreter of the regulation. There is no specific relevant delegation from Congress to the agency that the court can interpret to mean that "all relevant questions of law"—including questions about the meaning of an agency regulation—should be resolved by the agency within the wide bounds of reasonableness.

In order to extend the delegated lawmaking theory of *Chevron* to agency interpretations of regulations, one would have to identify a statute that delegates authority to the agency to interpret its own regulations through nonbinding interpretative rules (or in other nonbinding formats). Such a delegation might plausibly be interpreted to mean that Congress intended the agency to interpret its regulations in any fashion that the agency deemed appropriate, which, in turn, might justify applying a reasonableness standard to such interpretations. Such a delegation would be highly unusual, and certainly nothing like the one presented in this case. Consequently, it is unnecessary to consider whether such a delegation might satisfy the implied-delegation rationale for reviewing an agency's interpretation of its own regulation under a reasonableness standard.

B. Section 553

A second feature of the APA that calls into question the appropriateness of a reasonableness standard of review of agency interpretations of their regulations is grounded in the procedural requirements for rulemaking set forth in Section 553. That provision creates a structure that generally requires public participation (in the form of notice and comment) before an agency may craft a rule with the force of law. Judicial review should not be constrained in such a way as to give a rule the (effective) force of law *without* public participation.

Section 553 establishes the general proposition that an agency which wants to adopt a "rule" must comply with the statutory notice-and-comment procedures. *See* 5 U.S.C. § 553(b), (c). However, those subsections also provide that "interpretative rules"

and "policy statements" are exempt from these procedural requirements. The combination of the general proposition and the specific exceptions has always been understood to mean that "legislative rules"—those that bind persons outside the agency with the force of law—generally must be promulgated using notice-and-comment procedures. In contrast, "interpretative rules" may be promulgated without complying with these procedures. The justification for exempting interpretative rules and policy statements from notice and comment procedures is that such rules "do not have the force and effect of law and [thus] are not accorded that weight in the adjudicatory process." *Perez*, 135 S. Ct. at 1203-04.

This statutory framework creates what has been aptly called a "pay me now or pay me later" incentive structure for agencies. Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 Geo. Wash. L. Rev. 1449, 1464 (2011). If the agency promulgates a legislative rule, it obtains the benefit of a legally binding directive that provides the basis for an enforcement action without further justification. In order to achieve this binding effect, however, the agency must incur an *ex ante* cost: it must submit the proposed rule to notice-and-comment procedures, which afford members of the public an opportunity to object to specific aspects of the regulation and require the agency to respond to those objections. In contrast, if the agency promulgates an interpretative rule, it can forgo the notice-and-comment process and issue the regulation simply by publishing it in the *Federal Register*. In forgoing public participation, however, the agency also eliminates any suggestion that the rule has the effect of binding the public. Thereafter, whenever the rule is put at issue

in litigation (whether through an enforcement action by the agency, or in a private civil action), the agency's interpretation is not binding on the court and is open to a more searching challenge.

The incentive structure embedded in Section 553 has been refined and reinforced by the dual standard of review recognized in *Mead* for agency interpretations of *statutes*. If the agency incurs the upfront cost of notice-and-comment procedures, it not only promulgates a legally binding rule; it also satisfies the conditions for having any legal interpretation reflected in the rule subject to review under the reasonableness standard (*Chevron*). If instead the agency decides to promulgate an interpretative rule without notice and comment, it not only forgoes any legally binding effect, it also subjects any statutory interpretation reflected in the rule to the more searching persuasiveness standard (*Skidmore*).

The application of reasonableness review to interpretative *regulations* upsets this carefully crafted incentive structure. Interpretative regulations, by the plain mandate of the APA, are exempt from the notice-and-comment requirements of Section 553 ("pay me now"). But subjecting the agency's interpretation of its own regulations to the highly deferential reasonableness standard greatly reduces the opportunity for serious scrutiny of such interpretation in subsequent litigation ("pay me later"). The agency's interpretation receives essentially the same deference as if the agency had subjected that interpretation to notice-and-comment rulemaking—even though it did not. Subjecting interpretative regulations to a reasonableness standard of review thus allows agencies to make law without meaningful public input or accountability to the public, either before or

after the interpretation is adopted. There should be no "pay me never" option.

III. The Court Should Adopt The Persuasiveness Standard In Reviewing An Agency's Interpretation Of Its Own Regulations.

The Court should take this opportunity to specify, definitively, the standard of review that applies to agencies' nonbinding interpretations of their own rules, and provide a justification for the standard selected. In choosing an appropriate default standard of review, the Court should give significant weight to the language, structure, and longtime understanding of the APA. The APA is a unique trans-substantive statute, the basic charter for nearly every agency throughout the far-flung operations of the federal government, and has been widely emulated by the states. It is important that the balance it has struck in framing required procedures be preserved. *See Perez*, 135 S. Ct. at 1206-07; *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523-24 (1978). Other factors, such as the desirability of separating the law-promulgating function from the law-interpreting function, are also relevant. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 680-85 (1996). In light of these considerations, it is also appropriate to acknowledge the superior experience of the agency in implementing the statutory regime under which it functions, and its familiarity with its own regulations and how they operate.

In weighing these competing factors, it is important that the Court announce a clear default standard that applies in the context of agency inter-

pretations of their own regulations. In selecting an appropriate default standard, the goal of clarity is best served by adopting one that has a relatively robust history of prior application—if not in the regulatory-interpretation context, then in closely analogous situations. This consideration weighs against developing some new standard of review for use in reviewing agency interpretations of their regulations, perhaps one that falls between *Chevron* and *Skidmore*, or between *Skidmore* and *de novo* review. Lower courts, agencies, Congress, and the regulated community would likely find this confusing, at least until later decisions elaborate and refine the new standard. The Court should pick from the current menu.

For the sake of clarity, the Court should also make one selection—a single default standard, rather than a standard subject to a series of exceptions, such as those recognized in *Gonzales v. Oregon* (anti-parroting) and *Christopher v. SmithKline Beecham* (frustrated reliance). *See* pp. 10-11 & note 5, *supra*. The rule-with-exceptions approach creates uncertainty because of the uncertain scope of the exceptions, and further uncertainty about whether additional exceptions will be recognized in future cases.

Ambiguity about the appropriate standard will frustrate actors throughout the administrative-review system, regulators and regulated alike. A clear rule will benefit lower courts, which need to know what standard of review to apply in contested cases; agencies, which would benefit from knowing what kinds of procedural formats and what kinds of explanations about the meaning of their regulations will satisfy reviewing courts; and Congress, which will benefit from knowing what kinds of statutory signals will trigger what kind of judicial review. A

clear standard of review also benefits the many parties subject to regulatory oversight, which need to know what they can expect from agencies (and, hence, what they can challenge) when an agency takes an action.

Putting all this together, the persuasiveness standard is the best choice as a general default standard of review to apply to agency interpretations of their own regulations. First, as should be obvious, the persuasiveness standard (*Skidmore*) is a highly familiar standard of review in the statutory interpretation context. *See* Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 Colum. L. Rev. 1235, 1291-99 (2007) (surveying 106 court of appeals decisions applying the *Skidmore* standard over a five year period and offering helpful suggestions for a synthesis). Applying the same standard when reviewing agency interpretations of their regulations will allow courts to draw on this substantial body of precedent.

Second, the persuasiveness standard is much easier to reconcile with the APA than the reasonableness standard. The reasonableness standard, as discussed in Part II, is difficult to reconcile with the APA unless the agency acts with the force of law in adopting an interpretation of its own regulations. The persuasiveness standard, in contrast, is much closer to the approach courts took in reviewing agency interpretations of law in the pre-APA period. *Skidmore* itself was decided two years before the APA was adopted in 1946). Virtually from its earliest days, this Court gave "weight" to agency interpretations of law in certain circumstances. *See, e.g.*, *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 371 (1809); *Edward's Lessee v. Darby*, 25 U.S. (12

Wheat.) 206, 210 (1827); *United States v. Moore*, 95 U.S. 760, 763 (1877); *Brown v. United States*, 113 U.S. 568, 570-71 (1885); *see generally* Annotation, *Effect of Practical or Administrative Construction of Statute on Subsequent Judicial Construction*, 73 L. Ed. 322 (1929) (citing hundreds of state and federal cases discussing deference to administrative positions). The framers of the APA were surely familiar with this background. Even if they assumed courts would exercise independent judgment in determining the "meaning or applicability of the terms of an agency action," including agency rules, they would hardly be surprised if courts looked to the agency interpretation for guidance and would follow the agency if they found its views persuasive.

The persuasiveness standard also is more compatible with the structure of incentives created by Section 553. Under the reasonableness standard, an agency that interprets its own regulation is not required to "pay now" (by following notice-and-comment procedures) and is required to "pay later" only a minimal amount (that needed to convince a reviewing court that its interpretation is reasonable). Under the persuasiveness standard, an agency will have to put greater effort, at the time it renders an interpretation, into explaining how the interpretation is consistent with the regulation, how it advances the agency's regulatory objectives, and why the interpretation is not merely designed to affect the outcome of pending litigation, as well as addressing other possibly relevant factors. In other words, it will have to "pay some" in issuing its interpretation—not in terms of formalized public participation but in terms of developing a better reasoned decision. Upon judicial review, the agency will also be put to

the task of explaining why its interpretation is persuasive, under the factors identified by *Skidmore* and in later decisions applying the persuasiveness standard. It will have to "pay some more" in terms of a more searching judicial inquiry into the rationale for its interpretation. Paying some now and paying some more later aligns better with the incentive structure of Section 553.

Finally, the persuasiveness standard would address many of the infirmities associated with use of the reasonableness standard in this context. Both Justices and commentators have sharply criticized the *Seminole Rock/Auer* regime for allowing agencies to (i) evade the notice-and-comment provisions of the APA by "enact[ing] mush" and then clarifying it in an interpretive regulation;[6] (ii) change interpretations of regulations in response to the changing policy preferences of different administrations;[7] (iii)

---

[6] *See, e.g.*, *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) ("To expand this ["notice-and-comment-free"] domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment."); *Thomas Jefferson Univ.*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process."); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 12 (1996) (*Auer* "generates incentives to be vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures"); Manning 655-60.

[7] *See, e.g.*, *Decker*, 568 U.S. at 618-19 (Scalia, J., concurring in part and dissenting in part) (noting that "the leadership of

change interpretations of regulations in ways that frustrate the legitimate expectations of regulated entities;[8] (iv) adopt interpretations designed to affect the outcome of pending litigation against the agency;[9] (v) accumulate unchecked governmental power in the executive branch;[10] and (vi) become "more vulnerable to the influence of narrow interest groups."[11] The persuasiveness standard would require agencies to give a reasoned explanation for its interpretations, which would include an explanation for why any of these potential criticisms, if applicable, is inapposite or is outweighed by other considerations. This explanation would be subject to probing on judicial review.

The persuasiveness standard would be no panacea. But it would do more to rein in these forms of administrative mischief than the reasonableness standard. This would be at least a small measure of progress in administrative law.

---

agencies (and hence the policy preferences of agencies) changes with Presidential administrations").

[8] *See, e.g., Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (Scalia, J., concurring) (*Auer* "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government").

[9] *See, e.g., Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988) (deferring to the agency's interpretation despite "recogniz[ing] that the Secretary had not taken a position on this question until this litigation.").

[10] *See, e.g., Perez*, 135 S. Ct. at 1217-22 (Thomas, J., concurring in the judgment); Manning 680-85.

[11] *See, e.g.*, Manning 676-80.

IV. *Stare Decisis* Is No Reason To Adhere To The Reasonableness Standard.

If the Court concludes that something other than the reasonableness standard is appropriate as a general default standard, it is not clear that any of its prior decisions would need to be disturbed. That is because, in deciding whether to accept or reject an agency's interpretation of its own regulations, the Court has never considered whether the use of a reasonableness standard, as opposed to the persuasiveness standard, would result in a different outcome. Under the reasonableness standard, as illustrated by the decision of the court of appeals below, once the Court concludes that the agency's interpretation is reasonable, its inquiry ends. *See, e.g.*, *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 101 (1995); *Methow Valley*, 490 U.S. at 358-59. But often, the agency's "reasonable" interpretation is also the most persuasive one. *See, e.g.*, *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 63 (describing the agency's interpretation as "[t]he better reading of the regulation").

It is therefore uncertain at best whether the Court would have reached a different result in any of its cases applying *Seminole Rock* had the persuasiveness standard been applied instead.[12] Concerns

---

[12] *Decker* is not to the contrary, despite Justice Scalia's statement in his partial concurrence and dissent that "the Court's deference to the agency makes the difference." 568 U.S. at 617. Justice Scalia appeared to assume the alternative to *Seminole Rock* was *de novo* review. Whether a different outcome would have been reached by applying a *de novo* standard of review is a separate question entirely from whether a different outcome would have been reached by applying the persuasiveness standard. Had the persuasiveness standard been applied in

that would otherwise counsel adhering to precedent have little force in disapproving a standard of review that cannot be shown to have been outcome-determinative in any particular case. *Cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005) (reasoning that rejecting a standard announced in previous cases did "not require [the Court] to disturb any [] prior holdings" because it was never applied by the Court to determine the outcome of a case).

Nor should the Court be concerned that departing from the reasonableness standard may upset decisions of the lower courts or the expectations of litigants. Over the past decade, Justices have expressed—in numerous dissenting and concurring opinions—that the Court has been "await[ing] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *E.g.*, *Perez*, 135 S. Ct. at 1211 (Alito, J., concurring in part and concurring in the judgment). Predictability and reliance concerns have less bearing where "[a]ny reader of this Court's opinions should think that the doctrine is on its last gasp." *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari).

The time has come to consider what standard of review should apply as a general default when courts review an agency's interpretation of its own regulations. For the reasons set forth herein, the best default standard is the persuasiveness standard associated with *Skidmore*.

Decker, the Court likely would have reached the same result. *See, e.g.*, 568 U.S. at 614 (noting that "[t]he agency has been consistent in its view" of the regulation at issue, a relevant factor under *Skidmore*).

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for the court of appeals to apply the persuasiveness standard articulated in *Skidmore*.

Respectfully submitted.

THOMAS W. MERRILL
435 W. 116th Street
New York, NY 10027

WILLIAM M. JAY
Counsel of Record
LEVI W. SWANK
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

Counsel for Amicus Curiae

January 31, 2019

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN FARM BUREAU FEDERATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, SUPPORTING PETITIONER

MEGAN BERGE
JARED WIGGINTON
ADAM DEC
WILLIAM SEIDLECK
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

EVAN A. YOUNG
Counsel of Record
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Ste 1500
Austin, Texas 78701-4078
(512) 322-2500
evan.young@bakerbotts.com

Counsel for Amici Curiae

(additional counsel listed on inside cover)

AMY CHAI
THOMAS J. WARD
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th St. NW
Washington, D.C. 20005
(202) 266-8232
Counsel for Amicus Curiae
National Association of
Home Builders

KATIE SWEENEY
NATIONAL MINING
ASSOCIATION
101 Constitution Ave. NW,
Ste 500 E
Washington, D.C. 20001
(202) 463-2646
Counsel for Amicus Curiae
National Mining Association

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
1201 F Street NW, Ste 200
Washington, D.C. 20004
Counsel for Amicus Curiae
National Federation of
Independent Business

SCOTT YAGER
NATIONAL CATTLEMEN'S
BEEF ASSOCIATION
1275 Pennsylvania Ave., NW, Ste 801
Washington, D.C. 20004
(202) 347-0228
Counsel for Amicus Curiae National
Cattlemen's Beef Association

ELLEN STEEN
TRAVIS CUSHMAN
AMERICAN FARM BUREAU
FEDERATION
600 Maryland Ave., SW,
Ste 1000 W
Washington, D.C. 20024
(202) 406-3618
Counsel for Amicus Curiae
American Farm Bureau Federation

PETER C. TOLSDORF
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10 St., NW, Ste 700
Washington, D.C. 20001
(202) 637-3133
Counsel for Amicus Curiae the
National Association of Manufacturers

RICHARD MOSKOWITZ
TAYLOR HOVERMAN
AMERICAN FUEL &
PETROCHEMICAL
MANUFACTURERS
1800 M Street, NW
Suite 900 North
Washington, D.C. 20036
(202) 457-0480
Counsel for Amicus Curiae American
Fuel & Petrochemical Manufacturers

TABLE OF CONTENTS

Page

Interest of *Amici Curiae* and Introduction 1
Summary of Argument 5
Argument 6
I. Past Judicial Decisions Show How *Auer* Unfairly And Significantly Harms Businesses And Individuals 7
A. *Auer* promotes judicial abdication that can have crippling economic consequences 7
B. *Auer* nudges courts to acquiesce in agency actions that disrupt legitimate reliance interests 12
C. By saving flawed agency interpretations, *Auer* fosters the writing of unclear rules 16
D. *Auer* is inconsistent with the APA 21
II. *Auer*'s Hidden Harms Are No Less Real Or Significant 23
III. Overruling *Auer* Will Not Overburden The Courts 26
Conclusion 29

TABLE OF AUTHORITIES

Page(s)

CASES

Belle Co. v. *U.S. Army Corps of Eng'rs*,
761 F.3d 383 (5th Cir. 2014) 22

Cape Hatteras Access Pres. All. v. *U.S. Dep't of Interior*,
344 F. Supp. 2d 108 (D.D.C. 2004) 10

Christopher v. *SmithKline Beecham Corp.*,
567 U.S. 142 (2012) 12, 14, 15

City of Arlington v. *FCC*,
569 U.S. 290 (2013) 28, 29

Clark v. *U.S. Dep't. of Agric.*,
537 F.3d 934 (8th Cir. 2008) 14

Decker v. *Nw. Envtl. Def. Ctr.*,
568 U.S. 597 (2013) ..... *passim*

Eisai, Inc. v. *FDA*,
134 F. Supp. 3d 384 (D.D.C. 2015) 9

Foster v. *Vilsack*,
820 F.3d 330 (8th Cir. 2016) 15

Foster v. *Vilsack*,
No. CIV. 13-4060-KES, 2014 WL
5512905 (D.S.D. Oct. 31, 2014) 14, 15

Garco Constr., Inc. v. *Speer*,
138 S. Ct. 1052 (2018) 19

Gutierrez-Brizuela v. *Lynch*,
834 F.3d 1142 (10th Cir. 2016) 7, 8

Home Builders Ass'n of N. Cal. v. *U.S. Fish & Wildlife Serv.*,
616 F.3d 983 (9th Cir. 2010) 10

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 8

Marsh v. *J. Alexander's LLC*,
905 F.3d 610 (9th Cir. 2018) 21

Mittelstadt v. *Perdue*,
No. 17-2447, 2019 WL 191045 (7th Cir. Jan. 15, 2019) 11, 12

Moore v. *Hannon Food Serv., Inc.*,
317 F.3d 489 (5th Cir. 2003) 13

New Hope Power Co. v. *U.S. Army Corps of Eng'rs*,
746 F. Supp. 2d 1272 (S.D. Fla. 2010) 22

N.M. Cattle Growers Ass'n v. *U.S. Fish & Wildlife Serv.*,
248 F.3d 1277 (10th Cir. 2001) 11

Paragon Health Network, Inc. v. *Thompson*,
251 F.3d 1141 (7th Cir. 2001) 12

Perez v. *Mortg. Bankers Ass'n*,
135 S. Ct. 1199 (2015) 21, 28

Rapanos v. *United States*,
547 U.S. 715 (2006) 17, 25

Rivera v. *Peri & Sons Farms, Inc.*,
735 F.3d 892 (9th Cir. 2013) 15, 16

Rivera v. *Peri & Sons Farms, Inc.*,
No. 311:11-cv-008118-RCJ-VPC (D. Nev. Dec. 15, 2015), ECF 182 16

Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) 23

Sec'y of Labor v. *Beverly Healthcare-Hill-View*, 541 F.3d 193 (3d Cir. 2008) 13, 14

Summit Petroleum Corp. v. *EPA*, 690 F.3d 733, 737, 741 (6th Cir. 2012) 20, 21

Talk Am., Inc. v. *Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) ..... *passim*

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 17

United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003) 17, 18

W. Mass. Elec. Co. v. *FERC*, 165 F.3d 922 (D.C. Cir. 1999) 9

Whetsel v. *Network Prop. Servs., LLC*, 246 F.3d 897 (7th Cir. 2001) 12, 13

STATUTES

5 U.S.C. § 702 24

33 U.S.C. § 1344(f)(1)(A) 24

REGULATORY AUTHORITIES

7 C.F.R. § 12.31(b)(2)(ii) 14

29 C.F.R. § 541.118(a)(6) 12, 13

33 C.F.R. § 323.4(a)(1)(ii) 24

33 C.F.R. § 328.3(b)(2) 22

40 C.F.R. § 122.34(b)(5) 25

58 Fed. Reg. 45,008, 45,033-45,034 (Aug. 25, 1993) 22

General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in Massachusetts, Apr. 4 2016 26

General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in New Hampshire, Jan. 18, 2017 26

U.S. Army Corps of Engineers, Kohley Farm Jurisdictional Determination 19

U.S. Army Corps of Engineers, Van Noble Farms Determination 18

U.S. Dep't of Labor, Field Assistance Bulletin 2009-2, Travel and Visa Expenses of H-2B Workers Under the FLSA (2009) 15

OTHER AUTHORITIES

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016) 8, 19, 28

Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* (2017) 27

Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex. L. Rev. (forthcoming 2019) 27

The Federalist No. 47 (James Madison) 8

John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 19

Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421 (1987) 8

Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. 1377 (2017) 19, 20

Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 Colum. L. Rev. 85 (2019) 19

IN THE

Supreme Court of the United States

No. 18-15

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS, AMERICAN FARM BUREAU FEDERATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL MINING ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, SUPPORTING PETITIONER

INTEREST OF *AMICI CURIAE* AND INTRODUCTION

Amici Curiae are a group of unrelated business associations whose members are regularly affected by the doctrine of *Auer* deference.[1] They are listed below.

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution. Petitioner's letter of consent to this brief and respondent's letter of blanket consent are both on file with Clerk.

Each *amicus* dedicates its resources to facilitating the work and livelihoods of its members—both individuals and companies—and enhancing those members' abilities to serve the public throughout the United States. Federal agencies—often more than one—pervasively regulate *amici*'s members, who repeatedly have experienced the consequences of those agencies' resort to the *Auer* doctrine. *Auer* occasionally allows welcome regulatory flexibility. But in the main, when agencies reinterpret their own regulations in a manner that fundamentally changes settled understandings, it denies the regulated public, like *amici*'s members, the certainty and predictability that they need to order their affairs.

Amici therefore have a substantial interest in this case and respectfully urge the Court to overrule or significantly narrow *Auer*. Doing so will better ensure that agencies regulate only in a clear, fair, and lawful manner consistent with the basic promises of the rule of law—and that courts do not defer to agencies when deference is not due. *Amici* include the following organizations.

1. The **National Association of Home Builders** (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers; its builder members construct about 80% of all new homes built in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB frequently participates as a party litigant and *amicus curiae* to safeguard

the constitutional and statutory rights and economic interests of its members and those similarly situated.

2. The **American Farm Bureau Federation** (AFBF), headquartered in Washington, D.C., was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, the AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts, to represent its members.

3. The **National Association of Manufacturers** (NAM), based in Washington, D.C., is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

4. The **National Cattlemen's Beef Association** (NCBA), based in Centennial, Colorado, is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's food supply. NCBA works to advance the economic, po-

litical, and social interests of the U.S. cattle business and to advocate for the cattle industry's policy positions and economic interests.

5. The **National Mining Association** (NMA), based in Washington, D.C., is a national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral-processing machinery, equipment, and supplies; and engineering and consulting firms, financial institutions, and other firms serving the mining industry. NMA often participates in litigation raising issues of concern to the mining community.

6. The **National Federation of Independent Business** (NFIB), based in Nashville, Tennessee, is the nation's leading small business association, representing members in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. To protect its members' interests, NFIB frequently files *amicus curiae* briefs in cases that threaten to harm small businesses.

7. The **American Fuel & Petrochemical Manufacturers** (AFPM) is a national trade association whose members comprise virtually all United States refining and petrochemical manufacturing capacity. AFPM's members supply customers with a wide variety of products that Americans use daily in their homes and businesses. AFPM members help meet the nation's fuel and petrochemical needs, strengthen economic and national security, and support nearly three million American jobs. AFPM regularly engages in legal advocacy on issues that affect its members.

* * *

Amici echo petitioner's arguments that the Court should definitively resolve the lingering doubt about *Auer*'s continuing viability by either abandoning or significantly narrowing the doctrine. As concrete examples of *Auer*'s seen and unseen harms illustrate, *Auer* is an unnecessarily harmful impediment to businesses and individuals who must rely on the language agencies choose in their rules, trusting that the rule really does mean what it says. Reining in *Auer* would ensure clearer rulemakings and create a fairer regulatory environment, to the great benefit of *amici* and their vast memberships.

SUMMARY OF ARGUMENT

The problems with the *Auer* doctrine transcend the constitutional and other legal deficiencies with which the Court is familiar, and which alone would justify overruling the case. *Amici* focus on the concrete, real-world consequences that are largely hidden from view. The way that *Auer* affects Americans in practice should remove any doubt that the Court should repudiate *Auer*.

When an agency invokes *Auer*—by name or just by deed—it claims the power to interpret the words of its own vague or ambiguous regulations, regardless of prior positions or the public's prior understanding and reliance. Casual reliance on *Auer* in the courts has a massive effect on the law, often determining enormous stakes for individuals and organizations in a variety of contexts. *Auer*'s reach spans criminal liability, costly compliance programs, civil rights, a lawful immigrant's right to remain in the United States, or, in this case, a Vietnam veteran's receipt of benefits—and countless other areas of the law.

Auer's broad sway is most stifling during routine interactions between the regulated community and federal agencies. Someone facing an agency's questionable interpretation of a regulation that the agency deems "am-

biguous" knows (or soon will learn) that *Auer* is always lurking. Given the degree of deference courts afford under *Auer*, such a person often sees little choice but to capitulate. Thus, *Auer*'s greatest force lies not in judicial decisions, but in the instances where a person does not even turn to the courts for relief.

Whether seen or hidden, the injuries *Auer* inflicts on individuals and businesses are real and significant. The Court should abandon this doctrine, which would encourage agencies to be clearer in drafting regulations and allow courts to play their proper role in interpreting the regulatory burdens imposed on the public.

ARGUMENT

Only the foolish would choose to build their house upon the sand.[2] *Auer*, however, strips that choice away from individuals and businesses by replacing the bedrock of legitimate judicial scrutiny with the mire of presumptive deference. With little or no notice, *Auer* allows agencies to drastically transform the regulatory foundation on which individuals and businesses have built their lives and livelihoods, and to do so with impunity.[3]

Under the *Auer* doctrine, the Court defers to an agency's interpretation of its own regulations, unless that interpretation is plainly erroneous or flatly inconsistent with a regulation's text. *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013). An agency's interpretation of its ambiguous regulation is thus all but predestined to prevail, even when it is not obvious, practical, or otherwise legally sound, and even when it contradicts previous judicial decisions and agency guidance. The regulated community, therefore, lacks safe ground from the costly in-

---

[2] See Matthew 7:24-27.

[3] Unless otherwise indicated, *amici* use "*Auer*" to refer to the current state of interpretive deference.

stability that *Auer* engenders. The examples described below, in many of which *amici* here participated, document the inequitable and unsustainable conditions that *Auer* fosters. The Court can rectify this problem by overruling or significantly narrowing *Auer*.

I. Past Judicial Decisions Show How *Auer* Unfairly And Significantly Harms Businesses And Individuals

Businesses cannot avoid uncertainty flowing from market forces, third-party actions, and other variables. But *Auer* adds an additional, unjustifiable, and especially problematic form of uncertainty. Because it allows federal agencies to alter prior regulatory interpretations without public notice or comment (and also to retroactively enforce the resulting novel positions), *Auer* can destabilize sound business decisions, creating risk that even hiring "an army of perfumed lawyers" cannot eliminate. *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). As aptly stated by the late Justice Scalia, the very author of *Auer* who came to see its flaws: "Enough is enough." *Decker*, 568 U.S. at 616 (Scalia, J., concurring in part and dissenting in part).

A. *Auer* promotes judicial abdication that can have crippling economic consequences

The *Auer* doctrine unjustifiably bestows the power to both make and interpret the law on a single entity—the same agency that then *enforces* that law, thus concentrating all three branches' powers in a single point. As Justice Scalia put it, "when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning * * *. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J.,

concurring) (internal citations omitted).[4] This bestowal of power invades what has for over two centuries been "emphatically the province and duty of the judicial department[:] to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

By merging these powers, *Auer* can result in outcomes that impose serious economic harms on regulated entities, if not at an agency's whim, at least without an agency's careful or transparent analysis. After all, the supposed careful analysis—often after notice and comment—presumably is what generated the ambiguous regulation that requires further clarification. But the premise of ambiguity is itself often questionable. As in the *Chevron* context, with *Auer* a judge's "simple threshold determination of clarity versus ambiguity may affect billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, labor laws, or the like." See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 (2016). *Auer* deference, in other words, often flows not from natural or even reasonable interpretations, but instead from the judiciary first finding some iota of ambiguity and then yielding to any somewhat-plausible interpretation by the rules' own drafters.

The extreme deference afforded by the courts under *Auer* is all too often cost-prohibitive for the individuals and businesses who would challenge an agency's questionable interpretation. Many cases illustrate this point,

---

[4] See also, *e.g.*, *Gutierrez-Brizuela*, 834 F.3d at 1155 (Gorsuch, J.) (quoting Federalist No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands * * * may justly be pronounced the very definition of tyranny."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987) ("[F]oxes should not guard henhouses * * *. Those limited by a provision should not determine the nature of the limitation.").

including *Eisai, Inc.* v. *FDA*, 134 F. Supp. 3d 384 (D.D.C. 2015). The loss of potentially hundreds of millions of dollars that would come from exclusive rights over a pharmaceutical turned on the court's conclusion that strong arguments were "insufficient to compel the Court to cast aside the high level of deference that *Auer*" requires, which it felt "bound to follow * * * until the Supreme Court modifies the relevant standard." *Id.* at 394 n.2, 395. Because the court detected a modicum of regulatory ambiguity, *id.* at 394, it understood *Auer* to require disregarding arguments that the court itself credited as "substantial," "not without merit," and otherwise probative, *id.* at 395-397.

Incredibly, courts have even invoked *Auer* without identifying the ambiguous regulatory terms. For example, in *Western Massachusetts Electric Company* v. *FERC*, 165 F.3d 922 (D.C. Cir. 1999), the court allowed FERC to splice missing words into a regulation without first identifying ambiguity, frustrating a series of multi-million-dollar interconnection agreements. Sophisticated industry members (who had retained counsel) interpreted federal rules to require the agreements be submitted to state authorities, rather than FERC. *Id.* at 926. But FERC "believed" otherwise, asserted jurisdiction, and demanded that costs for the project be allocated differently than negotiated. *Ibid.* Relying on *Auer*, the court surrendered its interpretive role to FERC.

As *Eisai* and *Western Massachusetts* illustrate, *Auer* can lead courts to suspend meaningful scrutiny of agency action even when regulated individuals and businesses have the better arguments *and* will suffer great losses because of the new agency "interpretation" of its own regulation. *Auer* can also lead to a more extreme form of judicial abdication, where deference to an agency's inter-

pretation of its regulation is essentially a foregone conclusion.

For example, in *Cape Hatteras*, a district court applied *Auer* and upheld the U.S. Fish and Wildlife Service's designation of 126 linear miles of shoreline in North Carolina as critical habitat for wintering piping plovers over challenges filed by two North Carolina counties. *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 115-116 (D.D.C. 2004).[5] The coastal counties, which depended on the combined annual revenue of $386 million from tourism, sued the Service to preclude the possibility of beach closures, expensive and time-consuming consultation under the Endangered Species Act, and adverse impacts on land use and recreational and commercial uses of the designated areas. *Id.* at 116.

Plaintiffs contended that the Service's adoption of mean lower water lines and vegetation lines as boundaries violated the agency's regulations prohibiting the use of "[e]phemeral reference points" (*e.g.*, trees and sand bars) to define critical habitat for the plovers. *Id.* at 125-126. The Service argued that the lines were not ephemeral because "though they may shift over time, they will always exist." *Id.* at 126. Deeming "ephemeral" to be ambiguous, the district court invoked *Auer* and ruled in favor of the agency within the span of a single paragraph.[6]

High-stakes cases like these are not uncommon. As Chief Justice Roberts explained, "[q]uestions of *Semi-*

---

[5] Piping plovers spend 10 months each year on migratory routes and wintering grounds. *Cape Hatteras*, 344 F. Supp. 2d at 115.

[6] See also *Home Builders Ass'n of N. Cal.* v. *U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 991 (9th Cir. 2010) (deferring to the Service's interpretation of "specific area" under *Auer* to allow a designation of a half-million acres as critical habitat for vernal pool crustaceans).

nole Rock and *Auer* deference arise as a matter of course on a regular basis." *Decker*, 568 U.S. at 616 (Roberts, C.J., concurring). This includes, of course, not just blockbuster cases, but also "smaller" ones that affect individual livelihoods. For instance, the real-world implications of agency interpretations involving critical-habitat designations can be severe for cattlemen, who are forced to fence off rivers—at great personal expense and inconvenience—to prevent livestock from wading into critical habitats. See *N.M. Cattle Growers Ass'n* v. *U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284 n.3 (10th Cir. 2001) ("Due to the fencing, [a rancher] has been forced to reduce the size of his herd * * * [and] the fencing limits his access to river water which causes his significant inconvenience and financial harm." (internal quotation marks and citation omitted)). Similarly, home builders working in critical habitats are often required to set aside large percentages of their property to protect species—property that could otherwise be developed into useable home lots.

In *Mittelstadt* v. *Perdue*, a farmer acquired land in 1988 that was subject to a contract with the U.S. Department of Agriculture (USDA) under the Conservation Reserve Program (CRP), in which the farmer agreed to remove environmentally sensitive land from agricultural production in return for annual rental payments. No. 17-2447, 2019 WL 191045, at *1 (7th Cir. Jan. 15, 2019). Based on his farmland being designated as pine with "mixed hardwood," the farmer obtained a new CRP contract from 1998 to 2007. In 2007, however, the Farm Services Agency terminated the farmer's contract, finding that his property was ineligible based on an internal re-interpretation of the definition of "mixed hardwoods" (there was never a published definition of the term). *Ibid.* The Seventh Circuit recently affirmed this inter-

pretation based on the agency's "great discretion" to "tighten" the definition, citing a Seventh Circuit case applying *Seminole Rock* deference. *Id.* at *6 n.31 (citing *Paragon Health Network, Inc.* v. *Thompson*, 251 F.3d 1141, 1147 (7th Cir. 2001)).

The reluctance of judges to closely scrutinize agency interpretations due to *Auer*, perhaps for fear of reversal, has led to certainty of only one kind: a determined agency can likely get away with what it wants. Indeed, cases rejecting claims of *Auer* deference are blue-moon cases at best, signaling to the regulated public that there is not much to be gained by trying.

B. *Auer* nudges courts to acquiesce in agency actions that disrupt legitimate reliance interests

Another problem is that *Auer* lends itself to agency practices that undermine due-process principles by causing "unfair surprise" or otherwise "seriously undermin[ing] the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (citation omitted).

Perhaps one of the most detrimental examples of *Auer* frustrating legitimate reliance interests occurs when a deferring court overrules *its own precedent* that interpreted a straight-forward regulation. The Seventh Circuit did that in *Whetsel* v. *Network Prop. Servs., LLC*, 246 F.3d 897 (7th Cir. 2001). In *Whetsel*, an employee alleged that her employer was violating the Fair Labor Standards Act (FLSA) by maintaining a practice of impermissible pay deductions. The employer admitted to "isolated occasions" of deductions but claimed it was not liable because it had completed corrective measures within the "window of correction" under 29 C.F.R. § 541.118(a)(6). *Id.* at 899-900. The district court granted

summary judgment for the employer based on what most businesses would regard as a safe zone: a binding Seventh Circuit decision. *Id.* at 900. But on appeal, the Secretary of Labor filed an *amicus* brief offering an interpretation of its regulation conflicting with the Seventh Circuit's previous interpretation. That court found little more than a "modicum of support" for the Secretary's "strained" interpretation—yet quickly fell in line with *Auer* and overruled its own recent opinion. *Id.* at 902-904; but see *Moore* v. *Hannon Food Serv., Inc.*, 317 F.3d 489, 496 (5th Cir. 2003) (declining to extend *Auer* deference to the Secretary's interpretation "because § 541.118(a)(6) is unambiguous").

Another example of *Auer* causing unfair surprise is *Secretary of Labor* v. *Beverly Healthcare-Hill-View*, 541 F.3d 193 (3d Cir. 2008). In *Beverly*, the Occupational Safety and Health Administration (OSHA) cited a nursing home for failing to compensate certain employees for travel expenses and non-work time spent receiving medical treatment. An OSHA regulation required employers to ensure medical evaluations and procedures were provided to qualifying employees "at no cost." *Id.* at 195. The nursing home appealed the citations, and the Occupational Safety and Health Review Commission (the Commission) vacated them, determining that regardless of whether OSHA's interpretation of its ambiguous regulatory language "at no cost" was acceptable, the nursing home lacked fair notice because recent compliance directives were "studiously vague" and an existing guidance letter was "at odds" with OSHA's opinion letter. *Id.* at 201. On appeal—even after the Commission found its sister agency's action to be inadequate—the Third Circuit *reversed*, citing *Auer* and holding that the nursing home had fair notice from "the combination of" OSHA's opinion letter and an extra-circuit decision construing the word

"cost" under a comparable regulation. *Id.* at 205.

Recognizing this problem, the Court has attempted to pare back the *Auer* doctrine in certain circumstances by clarifying that it should not apply when an interpretation "conflicts with a prior interpretation," or is merely a "convenient litigating position" or a "*post hoc* rationalization * * * to defend past agency action against attack." *SmithKline*, 567 U.S. at 155 (internal quotation marks and citations omitted). In *SmithKline*, for example, this Court refused to afford *Auer* deference to a U.S. Department of Labor (DOL) interpretation of its regulations that would "impose potentially massive liability * * * for conduct that occurred well before that interpretation was announced." *Id.* at 155-156.

Nevertheless, lower courts have struggled to apply the lessons of *SmithKline* and have continued to read *Auer* as allowing agencies to shift interpretations with little notice; *post hoc* rationalizations to defend agency conduct to the detriment of individuals and businesses of all sizes have not diminished. For instance, the Eighth Circuit upheld USDA's interpretation of its regulations classifying a 0.8-acre portion of Arlen and Cindy Foster's farmland as wetlands, which significantly threatened the Fosters' livelihood.[7] To determine the land's status, 7 C.F.R. § 12.31(b)(2)(ii) required USDA to compare it with another site "in the local area," but USDA chose a tract over 30 miles away. The Fosters argued that "local area" meant adjacent or in close proximity, but the district court deferred to agency staff's *post hoc* testimony interpreting "local area" to mean anywhere within the *10,835 square-mile* major land resource area (larger than Massachu-

---

[7] Persons determined to have manipulated wetlands into a "converted wetland" may be ineligible to receive farm-program payments. *Clark* v. *U.S. Dep't. of Agric.*, 537 F.3d 934, 935 (8th Cir. 2008).

setts) in which the Fosters' farm was located. See *Foster* v. *Vilsack*, No. CIV. 13-4060-KES, 2014 WL 5512905, at *11 (D.S.D. Oct. 31, 2014). The Eighth Circuit affirmed the district court's decision. See *Foster* v. *Vilsack*, 820 F.3d 330, 332-333, 335 (8th Cir. 2016).

Just one year after *SmithKline*, the Ninth Circuit allowed a FLSA class-action suit to proceed against a family farm for conduct that DOL found acceptable just one year earlier. *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013). For decades, employers were not required to reimburse temporary guest workers for travel expenses until after their work was completed. In 2009, under a new administration, the Department issued contrary guidance that required employers to reimburse workers hired for the H-2B Program within the first week of work. DOL, Field Assistance Bulletin 2009-2, Travel and Visa Expenses of H-2B Workers Under the FLSA 1 (2009). When Peri & Sons, relying on well-established industry practice, failed to pay their workers within the first week, they became the subject of a class action.

At the Ninth Circuit, DOL filed an *amicus* brief arguing that Peri & Sons was liable under the agency's new interpretation, even for expenses incurred *before* issuance of the 2009 guidance. Br. for Sec'y of Labor as *Amicus Curiae* in Supp. of Plaintiffs-Appellants, *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) (No. 11-17365), EFC 13. The Department reasoned that its new interpretation "d[id] not create retroactivity concerns" because it "simply clarifie[d] what the law has always meant * * *." *Id.* at 25. Rather than applying an impartial interpretation of the DOL regulation, the Ninth Circuit deferred to the Department's "clarification." See *Rivera*, 735 F.3d at 899. After this Court denied Peri & Sons' petition for a writ of certiorari, the company settled

the class action for $2.8 million. *Rivera* v. *Peri & Sons Farms, Inc.*, No. 3:11-cv-00118-RCJ-VPC (D. Nev. Dec. 15, 2015), EFC 182 ([Proposed] Order Granting Final Approval of Class and Collective Action Settlement).

As these examples illustrate, it is unclear where the regulated community can turn for safety with the *Auer* doctrine entrenched in the judicial system. Even where ostensibly dispositive past practices, agency guidance, *and* binding judicial precedent exist, just the executive branch's whisper of "*Auer*" can make it all disintegrate.

C. By saving flawed agency interpretations, *Auer* fosters the writing of unclear rules

Yet another problem with the *Auer* doctrine is that it creates perverse incentives:

> [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.

Talk Am., 564 U.S. at 69 (Scalia, J., concurring). In a prior dissent (joined by Justices Stevens, O'Connor, and Ginsburg), Justice Thomas highlighted this problem with respect to regulations promulgated by the Department of Health and Human Services:

> [T]he Secretary has merely replaced statutory ambiguity with regulatory ambiguity. It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking

> process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504, 525 (1994) (5-4) (Thomas, J., dissenting). What agency wouldn't prefer the guarantee of flexibility tomorrow that flows from inserting ambiguity today?

Identifying actual instances where an agency purposefully injects ambiguity into a regulation is difficult—no sensible agency would openly admit it at the time. Yet evidence shows that agencies *have* promulgated and exploited ambiguous regulations with the purpose of expanding their jurisdiction and with the practical effect of imposing additional costs and burdens on the individuals and businesses that they regulate. See, *e.g.*, *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring) (noting that the Federal Communications Commission "has repeatedly been rebuked in its attempts to expand the [Telecommunications Act of 1996] beyond its text, and has repeatedly sought new means to the same ends"). The U.S. Army Corps of Engineers (Corps), too, has a history of adopting and interpreting ambiguous regulations to expand Corps jurisdiction when not bound by the rigors of notice-and-comment. See *Rapanos* v. *United States*, 547 U.S. 715, 725 (2006) (plurality op.).

The Corps' case-by-case interpretations of its intentionally ambiguous regulations harm individuals and businesses and, when challenged, are upheld under *Auer*. The Fourth Circuit, for example, relied on *Auer* to affirm a district court's remediation order requiring homeowners who violated the Clean Water Act (CWA) to fill in a drainage ditch that they had dug on their property and to restore it to pre-violation conditions. *United States* v. *Deaton*, 332 F.3d 698, 701-702 (4th Cir. 2003). Why had

they dug the ditch? To obtain a sewage-disposal permit for the construction of a residential subdivision, which had previously been denied *because of* the "poorly drained" condition of their property. *Id.* at 702. When the homeowners deposited the excavated dirt alongside the ditch in regulated wetlands on their property, the government sued them for failing to obtain a permit to discharge fill materials into "navigable waters" under Section 404(a) of the CWA. *Id.* at 702, 704.

The decision centered on a broad reading of "tributary." The Corps deemed the roadside ditch a "tributary" of the Wicomico River and claimed jurisdiction because the homeowners' wetlands drained into the ditch and eventually flowed into the Wicomico River and Chesapeake Bay. *Id.* at 708. The homeowners, on the other hand, contended that the term "tributary" in the regulation could not fairly encompass all branches of a system, but only those that empty "directly into a navigable waterway." *Id.* at 710. Although the court acknowledged that the regulation in question was ambiguous due to multiple possible interpretations of "tributary," it did not determine what the best or most rational reading of the regulation was. Instead, it cited *Auer* and held that "tributary" "means what the Corps says it means." *Id.* at 709, 711.[8]

---

[8] As a further example of how *Auer* leads to capricious outcomes, in November 2016, two Corps districts completed jurisdictional determinations related to two agricultural operations—one in New York, another in Illinois. Both farms have isolated waterbodies and wetlands approximately one mile from the nearest traditional navigable water. The Buffalo District found no significant nexus, and thus no jurisdiction, whereas the Chicago District found a significant nexus. See Van Noble Farms Jurisdictional Determination, available at https://www.lrb.usace.army.mil/Portals/45/docs/regulatory/JDForms/2016-11-Nov/JD-LRB-2016-01169NY.pdf?ver=2016-11-22-101257-237;

Despite concrete examples like those above, a recent article claims that no empirical evidence supports—and "some evidence" refutes—the "perverse incentives" critique of the *Auer* doctrine.[9] Using a computer program to complete a vagueness analysis of numerous economically significant rules adopted between 1982 and 2016, this article concludes that there has not been a post-*Auer* increase in the "vagueness" of regulations. Of course, assigning parameters for vagueness is inherently problematic; "virtually any phrase can be rendered ambiguous if a judge tries hard enough." Kavanaugh, *supra*, 129 Harv. L. Rev. at 2139 n.106 (quotation marks and citation omitted). This conclusion hardly undermines the perverse-incentives critique, particularly when agencies are incentivized to *find* ambiguities in the regulations they have drafted.

Past judicial decisions and scholarly articles show that these incentives are real, remain, and have concrete impacts.[10] There is also evidence that agency drafters "ag-

---

Kohley Farm Jurisdictional Determination, available at https://www.lrc.usace.army.mil/Portals/36/docs/regulatory/jd/2016/LRC-2016-833_jd.pdf.

[9] Daniel Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effect on Agency Rules*, 119 Colum. L. Rev. 85, 142 (2019).

[10] Judges and scholars have expressed serious doubt as to the wisdom and fairness of rewarding the drafting of ambiguous regulations. See, *e.g.*, *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1052 (2018) (Thomas, J., dissenting from denial of certiorari); *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 615 (2013) (Roberts, C.J., joined by Alito, J., concurring); John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996) (asserting that "doubts about Seminole Rock are well founded, and that the Court should replace Seminole Rock with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning").

gressively" interpret regulations when they know deference doctrines apply. See Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. 1377, 1419-20 (2017) (noting, unsurprisingly, that a majority of rule drafters responded that "a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies"). There is no reason to think drafters would not be similarly, or more, aggressive when *Auer* applies.

Ultimately, *Auer*'s effects cannot be assessed by assigning a numeric value to a regulation's "vagueness" because (1) even a small ambiguity can have disastrous results for those on the wrong side of the agency's reading, (2) deferring to the interpretation of whoever currently holds power means the ambiguity is never actually resolved, and (3) many hidden harms cannot be empirically measured. *Auer* forces courts to condone questionable regulatory interpretations to the benefit of agencies and to the detriment of the regulated community. It also threatens to inject politics into what should be an apolitical decision: what the text means. This judicial affirmation also fosters the writing of unclear regulations, regardless of the writer's intent, because *Auer* constrains courts from holding agencies accountable when they interpret poorly drafted regulations. Without that accountability, agencies lack incentive to *improve* their regulations' clarity.

The current incentive structure can actually *penalize* clarity—as when a Court finds that an unambiguous regulation is, precisely because drafted without ambiguity, *not* entitled to *Auer* deference. When that happens, an agency is essentially punished (or would understandably feel punished) for its better drafting at the outset. In *Summit Petroleum Corporation* v. *EPA*, for example,

the court rejected an invocation of *Auer* to more broadly interpret a regulation allowing aggregation of facilities as a single source if they are "contiguous or adjacent properties." 690 F.3d 733, 737, 741 (6th Cir. 2012). Because the term "adjacent" was unambiguous, EPA was held to have boxed itself in. *Ibid.* But had EPA used a vaguer term, it would have been rewarded with *Auer* deference.

Regulated individuals and businesses depend on predictable regulatory regimes, which in turn require clearly written rules. *Auer* undermines predictability by encouraging and otherwise allowing agencies to write unclear rules that can then be interpreted in myriad ways, depending on the prevailing preference. Agencies should not be rewarded for undermining regulatory clarity and stability.

D. *Auer* is inconsistent with the APA

Finally, *Auer* demonstrably offers an end-run around the Administrative Procedure Act (APA): it allows agencies to resolve ambiguity by reinterpreting regulations instead of using the APA's notice-and-comment requirements to alter them. See *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) ("By giving [regulations] *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain."); *Marsh* v. *J. Alexander's LLC*, 905 F.3d 610, 637-638, 642 (9th Cir. 2018) (en banc) (Ikuta, J., joined by Callahan, J., dissenting) (lamenting how the court allowed a substantive rule to masquerade as an interpretation under *Auer*—creating one of "the worst dangers of improper *Seminole Rock* and *Auer* deference"). This eviscer-

ates the judicial role under the APA—to independently and fairly review agency actions and interpretations.

In one case, a sugarcane grower and renewable-energy company challenged Corps guidance on Prior Converted Cropland (PCC). *New Hope Power Co.* v. *U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1284 (S.D. Fla. 2010). Joint regulations of the Corps and EPA provide that PCC falls outside the agencies' jurisdiction. 33 C.F.R. § 328.3(b)(2). The final rule adopting these regulations clearly states that land retains its PCC status regardless of use, unless abandoned. 58 Fed. Reg. 45,008, 45,033-45,034 (Aug. 25, 1993). Nevertheless, a Florida field office of the Corps circulated guidance indicating that shifting PCC to a non-agricultural use would immediately result in the land losing PCC status. This guidance substantially expanded the Corps' jurisdiction without complying with the APA's notice-and-comment process. *New Hope*, 746 F. Supp. 2d at 1284. New Hope challenged the guidance, and a district court set it aside as a substantive rule issued without following required procedures under the APA. *Ibid.*

Despite an opinion from the *New Hope* district court, the Corps continues to issue jurisdictional wetland determinations on PCC lands that are used for non-agricultural purposes, forcing landowners to accept those determinations or file suit. See, *e.g.*, *Belle Co.* v. *U.S. Army Corps of Eng'rs*, 761 F.3d 383, 397 (5th Cir. 2014) (distinguishing *New Hope* and finding the jurisdictional determination non-reviewable), vacated 135 S. Ct. 1548. In these circumstances, owners of PCC lands must either accept the Corps' jurisdictional determination or expend significant resources to litigate the same issue in a different forum, knowing that a court could very easily invoke *Auer* as decisive.

Overcoming litigation fatigue in the face of such agen-

cy tenacity requires no small effort. In each of the ways discussed above, *Auer* only makes it easier for agencies, if they so choose, to push beyond the scope of their authorized power.

II. *AUER*'S HIDDEN HARMS ARE NO LESS REAL OR SIGNIFICANT

The reported cases discussed above illustrate how *Auer* unreasonably transfers judicial power to executive agencies and can thereby disrupt legitimate reliance interests. While these memorialized examples of *Auer*'s sting are plentiful and significant, they are eclipsed by the rarely recorded instances of *Auer*'s hidden harms.

No matter how many times lower-court judges acknowledge *Auer*'s dubious foundation, they have no choice but to surrender to this Court's precedent. See, *e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). After witnessing two decades of courts deferring under *Auer*, sometimes firsthand, members of the regulated community are keenly aware of the case's implications. Thus, even with a powerful argument that an agency's interpretation is clearly erroneous, *Auer* easily dissuades those individuals and businesses from litigating.

This *Auer*-induced chilling effect has severe consequences. First, it reflects, and perpetuates, diminished public trust that the courts will overcome their predisposition to simply defer to agencies, as opposed to holding them accountable for their unreasonable actions. Second, by forestalling legitimate challenges to agency action, *Auer*'s chilling effect eliminates a crucial check on administrative overreach; *Auer* undermines the APA's clear intent that anyone "suffering legal wrong because of

agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof." 5 U.S.C. § 702. And, third, this chilling effect reduces the judiciary's opportunity to effectuate its role in maintaining the separation of powers.

Amici's members are constantly subject to an ever-changing web of regulatory interpretations strewn throughout the Federal Register, policy directives, guidelines, memoranda of understanding, circulars, handbooks, and informal statements from agency staff. These myriad and often hard-to-find sources containing impermanent regulatory interpretations on a variety of matters create substantial uncertainty for *amici*'s members and force them to take risks that should not be required.

This problem is prevalent in many areas, including farming and ranching. Ordinarily, a person must either obtain a permit under CWA Section 404 to discharge dredge or fill materials into waters of the U.S. or face the risk of significant legal and financial consequences. The statute, however, exempts "normal" farming and ranching activities. See 33 U.S.C. § 1344(f)(1)(A). Although the CWA does not define the term, regulations require "normal" activities to be part of an "established (i.e., on-going)" operation, and not a "new use." 33 C.F.R. § 323.4(a)(1)(ii).[11]

---

[11] To this day, farmers and ranchers still have no official interpretation of what constitutes an "established (i.e., on-going)" operation nor any clarity on how far back in time the operation must be "established." As a result, farmers and ranchers continue to face enforcement actions and hefty civil fines if they fail to get a CWA Section 404 permit. Many do not know if they are required to do so. And if the Corps decides to pursue an enforcement action, many farmers

Over the years, EPA and the Corps have interpreted what qualifies as "normal" or a "new use" not by giving a clear (even if multifaceted) definition after careful analysis and public comment, but through a series of regional manuals, circulars, and—troublingly—*ad hoc* enforcement actions. The agencies have been threatening farmers and ranchers with potentially ruinous civil and criminal penalties for plowing their own lands and switching between ranching and farming activities. To escape this threat, farmers and ranchers are forced to apply for costly permits. Indeed, as members of this Court have recognized, with some understatement, the burden associated with obtaining these permits "is not trivial," as the "Corps of Engineers [] exercises the discretion of an enlightened despot" and the "average applicant for an individual permit spends 788 days and $271,596 in completing the process." *Rapanos*, 547 U.S. at 721.[12]

Equally problematic are EPA's stormwater Phase II post-construction requirements, which obligate municipalities to obtain permits for stormwater discharges. See 40 C.F.R. § 122.34(b)(5). To obtain this permit, a municipality must develop a program to control stormwater runoff from developed sites, including "best management practices (BMPs) appropriate for the community." *Ibid.* Although a municipality is in the best position to know what practices would be appropriate for its community,

---

and ranchers are likely to seek quick settlements rather than resist because their economic livelihood depends on a successful grazing or growing season.

[12] In *Rapanos*, regulators informed plaintiff that the wetlands he backfilled were "waters of the United States" and that his action required a permit. Twelve years of criminal and civil litigation ensued—"for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines." 547 U.S. at 721.

EPA disagrees and routinely compels municipalities to adopt strict limitations for stormwater volume, sediment, and phosphorous concentration, even when the municipality has not independently determined or concurred that those limitations are appropriate for its community.[13] *Auer* snuffs out a municipality's hope of successfully challenging EPA's interpretation of the maddeningly vague phrase "appropriate for the community." Rather than waste money fighting a lost cause, most municipalities will reluctantly acquiesce to EPA's questionable demands.

These examples illustrate a common problem across the business world: challenges to agency interpretations are almost certainly doomed to fail. For *amici*'s members and similar businesses, time-is-money and profit margins can be razor thin. So it is hardly surprising that many entities with strong legal cases in theory simply opt not to fight in practice. As a result, many worthy cases that affect American businesses will never even be pursued, which further enshrines overreach as a permanent feature of administrative law.

III. OVERRULING *AUER* WILL NOT OVERBURDEN THE COURTS

Ultimately, there is no persuasive justification for keeping *Auer* deference as it exists today. *Decker*, 568 U.S. at 617 (Scalia, J., concurring). The two principal jus-

---

[13] See, *e.g.*, General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in Massachusetts, 2.3.6, 43-47, Apr. 4 2016, https://www3.epa.gov/region1/npdes/stormwater/ma/2016fpd/final-2016-ma-sms4-gp.pdf; General Permits for Stormwater Discharges From Small Municipal Separate Storm Sewer Systems in New Hampshire, 2.3.6, 46-50, Jan. 18, 2017, https://www3.epa.gov/region1/npdes/stormwater/nh/2017-small-ms4-general-permit-nh.pdf.

tifications—"special insight" and "special expertise"—are irrelevant. Regardless of whether agencies have some "special insight" into the intent or meaning behind regulations, "we are bound *by what they say*, not by the unexpressed intention of those who made them." *Id.* at 618 (emphasis in original).[14] Similarly, regardless of whether agencies possess "special expertise" in administering complex regulatory programs, interpreting policy is not synonymous with making policy, "unless one believes that the purpose of interpretation is to make the regulatory program work in a fashion that the current leadership of the agency deems effective." *Ibid.*

Neither do stare decisis concerns justify maintaining the *Auer* doctrine. As an interpretive methodology, *Auer* is broad and compulsive, straying "too far in asking the individual Justice to subordinate her authority to the Court's institutional past." *See* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 Tex. L. Rev. (forthcoming 2019) (manuscript at 9), https://ssrn.com/abstract=3312818. "The consequence * * * is that [an] administrative deference regime[] like * * * *Auer* [is] not entitled to stare decisis effect, at least as [it is] presently justified in the Court's jurisprudence." *Ibid.*; cf. also Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* 155-157 (2017).

The Court's best option is to overturn *Auer* and simply give effect to regulations as written. Doing so would provide the regulated community with predictability and the confidence to challenge unreasonable agency action, knowing that courts would no longer be predisposed to

---

[14] Even assuming the "special insight" rationale had some validity, which it does not, the value of that insight quickly dissipates with changing administrations and agency-employee turnover.

ruling against them at the outset of litigation. Taking this course would also give an agency "a stable background against which to write its rules and achieve the policy ends it thinks best." *Decker*, 568 U.S. at 619 (Scalia, J., concurring).

Notably, overturning *Auer* would not result in a flood of administrative law because the doctrine only applies where an agency interprets its own ambiguous regulations. With a clear rebuke of agency ambiguity, the incentive structure for agencies would shift to drafting clearer regulations and, to the extent that they cannot do so, at least to less brazen re-interpretations of regulations. In this instance, agencies who wish to see their desired outcome applied must simply write regulations that say what they mean, which they surely can do. See *Decker*, 568 U.S. at 617 (Scalia, J., concurring) (stressing that if agencies can articulate what regulations mean in legal briefs, they can do the same in the regulations themselves). When agencies do so, courts should expect *fewer* cases, not more.

Additionally, any fear that overruling the *Auer* doctrine would overburden courts with novel and unfamiliar cases lacks justification. Judges are "trained" to look for "the best reading" of legal texts—including of complicated legal texts. Kavanaugh, *supra*, 129 Harv. L. Rev. at 2153-2154; see also *Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment) ("[J]udges are frequently called upon to interpret the meaning of legal texts and are able to do so even when those texts involve technical language."). Indeed, federal judges must regularly interpret everything from federal patent laws to the federal criminal code. Judges are more than capable of reviewing and interpreting federal regulations and are the best-suited government officials to protect the regulated community from the "hundreds of federal agencies pok-

ing into every nook and cranny of daily life." *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

CONCLUSION

This Court should overturn or further narrow *Auer* doctrine.

Respectfully submitted.

MEGAN BERGE
JARED WIGGINTON
ADAM DEC
WILLIAM SEIDLECK
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

EVAN A. YOUNG
Counsel of Record
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Ste 1500
Austin, Texas 78701-4078
(512) 322-2500
evan.young@bakerbotts.com

Counsel for Amici Curiae

(additional counsel listed on next page)

January 2019

AMY CHAI
THOMAS J. WARD
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th St. NW
Washington, D.C. 20005
(202) 266-8232
Counsel for Amicus Curiae
National Association of
Home Builders

KATIE SWEENEY
NATIONAL MINING
ASSOCIATION
101 Constitution Ave. NW,
Ste 500 E
Washington, D.C. 20001
(202) 463-2646
Counsel for Amicus Curiae
National Mining Association

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS
1201 F Street NW, Ste 200
Washington, D.C. 20004
Counsel for Amicus Curiae
National Federation of
Independent Business

SCOTT YAGER
NATIONAL CATTLEMEN'S
BEEF ASSOCIATION
1275 Pennsylvania Ave., NW, Ste 801
Washington, D.C. 20004
(202) 347-0228
Counsel for Amicus Curiae National
Cattlemen's Beef Association

ELLEN STEEN
TRAVIS CUSHMAN
AMERICAN FARM BUREAU
FEDERATION
600 Maryland Ave., SW,
Ste 1000 W
Washington, D.C. 20024
(202) 406-3618
Counsel for Amicus Curiae
American Farm Bureau Federation

PETER C. TOLSDORF
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10 St., NW, Ste 700
Washington, D.C. 20001
(202) 637-3133
Counsel for Amicus Curiae the
National Association of Manufacturers

RICHARD MOSKOWITZ
TAYLOR HOVERMAN
AMERICAN FUEL &
PETROCHEMICAL
MANUFACTURERS
1800 M Street, NW
Suite 900 North
Washington, D.C. 20036
(202) 457-0480
Counsel for Amicus Curiae American
Fuel & Petrochemical Manufacturers

No. 18-15

IN THE
Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICI CURIAE* THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle Street, Suite 1300
Chicago, IL 60604
(312) 660-1613

RUSSELL ABRUTYN
WILLIAM A. STOCK
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
1331 G Street, N.W.
Suite 300
Washington, D.C. 20005
(202) 507-7600

JEAN-CLAUDE ANDRÉ *
ANDREW B. TALAI
GERRY B. HIRSCHFELD
SIDLEY AUSTIN LLP
555 W. Fifth Street, Suite 4000
Los Angeles, CA 90013
(213) 896-6000
jcandre@sidley.com

DEREK A. WEBB
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

January 31, 2019

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE COURT SHOULD OVERRULE *AUER* BECAUSE IT EXCEEDS *SEMINOLE ROCK* PRINCIPLES	4
II. THE MANY DISPARATE FORMS OF SUBREGULATORY INTERPRETATION TO WHICH *AUER* DEFERENCE APPLIES HARM THE REGULATED PUBLIC	12
A. A strong form of *Auer* deference does not account for the many different forms of subregulatory interpretation to which courts have applied it	13
B. The evils of *Auer* are most notable in their effects on the regulated public	17
III. *AUER* DEFERENCE IS PERNICIOUS WHERE QUASI-JUDICIAL AGENCIES LIKE THE BIA INTERPRET REGULATIONS THROUGH ADJUDICATION	21
A. Most circuits give *Auer* deference to the BIA's interpretation of ambiguous regulations	22
B. Affording *Auer* deference to BIA adjudications is particularly problematic	26
CONCLUSION	32

TABLE OF AUTHORITIES

CASES Page

Archuleta v. *Wal-Mart Stores, Inc.* (*In re Wal-Mart Stores, Inc., Fair Labor Standards Act Litig.*), 395 F.3d 1177 (10th Cir. 2005) 15, 16, 24
Ass'n of Bituminous Contractors, Inc. v. *Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) 16
Auer v. *Robbins*, 519 U.S. 452 (1997) ..... *passim*
Barnes v. *Holder*, 625 F.3d 801 (4th Cir. 2010) 23
Belt v. *EmCare, Inc.*, 444 F.3d 403 (5th Cir. 2006) 15
Benslimane v. *Gonzales*, 430 F.3d 828 (7th Cir. 2005) 28
Bigelow v. *Dep't of Def.*, 217 F.3d 875 (D.C. Cir. 2000) 14
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) 6, 7, 8
Chase Bank USA, N.A. v. *McCoy*, 562 U.S. 195 (2011) 14
Christopher v. *SmithKline Beecham Corp.*, 567 U.S. 142 (2012) 13, 26, 28
Coeur Alaska, Inc. v. *Se. Alaska Conservation Council*, 557 U.S. 261 (2009) 14
Cruz Rendon v. *Holder*, 603 F.3d 1104 (9th Cir. 2010) 28
Decker v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) 20, 21, 27
Dhuka v. *Holder*, 716 F.3d 149 (5th Cir. 2013) 25
Drake v. *FAA*, 291 F.3d 59 (D.C. Cir. 2002) 14

TABLE OF AUTHORITIES—continued

Page

Ehlert v. *United States*, 402 U.S. 99 (1971) 9
Excel Corp. v. *U.S. Dep't of Agric.*, 397 F.3d 1285 (10th Cir. 2005) 16
Fong Haw Tan v. *Phelan*, 333 U.S. 6 (1948) 29
Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980) 10
Galina v. *INS*, 213 F.3d 955 (7th Cir. 2000) 28
Go v. *Holder*, 744 F.3d 604 (9th Cir. 2014) 14
Gomez v. *Lynch*, 831 F.3d 652 (5th Cir. 2016) 23, 25, 29, 31
Gonzales v. *Oregon*, 546 U.S. 243 (2006) 13
Gourzong v. *Attorney Gen.*, 826 F.3d 132 (3d Cir. 2016) 24
Halmenschlager v. *Holder*, 331 F. App'x 612 (10th Cir. 2009) 24
Halo v. *Yale Health Plan*, 819 F.3d 42 (2d Cir. 2016) 16
Henry v. *INS*, 74 F.3d 1 (1st Cir. 1996) 31
Hernandez-Perez v. *Whitaker*, 911 F.3d 305 (6th Cir. 2018) 23
Humphrey's Ex'r v. *United States*, 295 U.S. 602 (1935) 21
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 29, 30
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 26
Intermodel Techs., Inc. v. *Peters*, 549 F.3d 1029 (6th Cir. 2008) 15
Jordan v. *De George*, 341 U.S. 223 (1951) 29

TABLE OF AUTHORITIES—continued

Page

Joseph v. *Holder*, 579 F.3d 827 (7th Cir. 2009) 25

Kadia v. *Gonzales*, 501 F.3d 817 (7th Cir. 2007) 29

Kaplun v. *Attorney Gen.*, 602 F.3d 260 (3d Cir. 2010) 23

Kiorkis v. *Holder*, 634 F.3d 924 (7th Cir. 2011) 23

L.D.G. v. *Holder*, 744 F.3d 1022 (7th Cir. 2014) 17

LaFleur v. *Whitman*, 300 F.3d 256 (2d Cir. 2002) 15

Lee v. *United States*, 137 S. Ct. 1958 (2017) 29

Lezama-Garcia v. *Holder*, 666 F.3d 518 (9th Cir. 2011) 25, 29

Li Shan Chen v. *U.S. Attorney Gen.*, 672 F.3d 961 (11th Cir. 2011) 23

Lin v. *U.S. Dep't of Justice*, 416 F.3d 184 (2d Cir. 2005) 31

Linares Huarcaya v. *Mukasey*, 550 F.3d 224 (2d Cir. 2008) 25, 29

Long Island Care at Home, Ltd. v. *Coke*, 551 U.S. 158 (2007) 14, 30

Maldonado v. *Lynch*, 786 F.3d 1155 (9th Cir. 2015) 23

Mansour v. *Holder*, 739 F.3d 412 (8th Cir. 2014) 23, 25, 29

Martinez v. *Holder*, 740 F.3d 902 (4th Cir. 2014) 25

Mellouli v. *Lynch*, 135 S. Ct. 1980 (2015) ... 18, 30

Mohammed v. *Gonzales*, 400 F.3d 785 (9th Cir. 2005) 28

TABLE OF AUTHORITIES—continued

Page

Morgan v. *United States*, 304 U.S. 1 (1938) 21, 29
Mullins Coal Co. of Va. v. *Dir., Office of Workers' Comp. Programs*, 484 U.S. 135 (1987) 10
Nat'l Ass'n of Home Builders v. *Defs. of Wildlife*, 551 U.S. 644 (2007) 30
N. Ind. Pub. Serv. Co. v. *Porter Cty. Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12 (1975) 9
Ohio Valley Envtl. Coal. v. *Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009) 15
Perez v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015) ..... *passim*
Perriello v. *Napolitano*, 579 F.3d 135 (2d Cir. 2009) 23
Peters v. *Hobby*, 349 U.S. 331 (1955) 9
Pub. Lands for the People, Inc. v. *U.S. Dep't of Agric.*, 697 F.3d 1192 (9th Cir. 2012) 16
Qwest Corp. v. *Colo. Pub. Utils. Comm'n*, 656 F.3d 1093 (10th Cir. 2011) 24
Reno v. *Flores*, 507 U.S. 292 (1993) 29
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) ... 31
Siskiyou Reg'l Educ. Project v. *U.S. Forest Serv.*, 565 F.3d 545 (9th Cir. 2009) 15
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 3, 5, 6
Talk Am., Inc. v. *Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) 3
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 27
Thorpe v. *Hous. Auth. of Durham*, 393 U.S. 268 (1969) 14
Udall v. *Tallman*, 380 U.S. 1 (1965) 9

TABLE OF AUTHORITIES—continued

Page

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 26
W. Radio Servs. Co. v. *Qwest Corp.*, 678 F.3d 970 (9th Cir. 2012) 16
Wang v. *Attorney Gen.*, 423 F.3d 260 (3d Cir. 2005) 28
Zhang v. *Holder*, 617 F.3d 650 (2d Cir. 2010) 24, 30

STATUTES AND REGULATIONS

5 U.S.C. § 553(b)(A) 11
8 U.S.C. § 1229a 22
§ 1101 *et seq.* 22
§ 1182(a)(1) 19
8 C.F.R. § 100.1 *et seq.* 22
42 C.F.R. § 34.2(c) 19

ADMINISTRATIVE DECISION

Matter of Armendarez-Mendez, 24 I. & N. Dec. 646 (B.I.A. 2008) 24

SCHOLARLY AUTHORITIES

Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the Seminole Rock Opinion*, Yale J. Reg.: Notice & Comment (Sept. 12, 2016), http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/ 8
Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 Ohio St. L.J. 813 (2015) 17

TABLE OF AUTHORITIES—continued

Page

Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47 (2015) 10

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 21, 28

Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 Geo. J. L. & Pub. Pol'y 87 (2018) 5

William Yeatman, Note, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L.J. 515 (2018) 16, 17

OTHER AUTHORITIES

Bd. of Immigration Appeals, U.S. Dep't of Justice, Board of Immigration Appeals Practice Manual, https://www.justice.gov/eoir/page/file/1103051/download (last updated Oct. 16, 2018) 22, 23, 26

Black's Law Dictionary (10th ed. 2014) 21

Tara Copp, *As Many as 11,800 Military Families Face Deportation Issues, Group Says*, Mil. Times (Apr. 1, 2018), https://www.militarytimes.com/news/your-military/2018/04/01/as-many-as-11800-military-families-face-deportation-issues-group-says/ 19

TABLE OF AUTHORITIES—continued

Page

Jason Dzubow, *Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge (part 2)*, The Asylumist (Oct. 5, 2016), https://www.asylumist.com/2016/10/05/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-2/ 27

Exec. Office for Immigration Review, U.S. Dep't of Justice, Board of Immigration Appeals, https://www.justice.gov/eoir/board-of-immigration-appeals (last visited Jan. 31, 2019) 22

Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. Times (Jan. 5, 2003), http://articles.latimes.com/2003/jan/05/nation/na-immig5 28

U.S. Gov't Accountability Office, GAO-17-438, Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (2017) 28

U.S. Citizenship & Immigration Servs., *Discretionary Options for Military Members, Enlistees and Their Families*, https://www.uscis.gov/military/discretionary-options-military-members-enlistees-and-their-families (last visited Jan. 31, 2019) 18

TABLE OF AUTHORITIES—continued

Page

U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., PA-2018-09, Policy Alert: Validity of Report of Medical Examination and Vaccination Record (Form I-693) (2018), https://www.uscis.gov/policymanual/Updates/20181016-I-693Validity.pdf 20

U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., PA-2014-005, Policy Alert: Validity Period of the Medical Certification on the Report of Medical Examination and Vaccination Record (Form I-693) (2014), https://www.uscis.gov/policymanual/Updates/20140530-I-693Validity.pdf 19, 20

U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., PM-602-0091, Policy Memorandum: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i) (2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf 18

U.S. Dep't of Homeland Sec., Families of U.S. Armed Forces Members and Enlistees (2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf 18

INTEREST OF *AMICI CURIAE*[1]

The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the Nation's leading law firms, NIJC provides direct legal services to approximately 10,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it promotes human rights on a local, regional, national, and international stage. NIJC has a substantial interest in the issue now before the Court, both as an advocate for the rights of immigrants generally and as the leader of a network of *pro bono* attorneys who regularly represent immigrants.

The American Immigration Lawyers Association ("AILA") is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy

---

[1] The parties have granted consent to the filing of this brief. Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no persons other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation and submission of this brief.

of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeals, and this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

With the ever-increasing use of administrative regulations to govern individual and corporate conduct and confer and/or limit rights, various rules requiring judicial deference to those regulations have also been increasingly criticized by Members of this Court, judges of the lower federal courts, and academics. The Court has sensibly responded to this groundswell of criticism by adding to its plenary docket for this Term several implicating a handful of these deference rules: *Gundy* v. *United States*, 138 S. Ct. 1260 (2018) (mem.) (No. 17-6086) (argued Oct. 2, 2018) (whether the federal Sex Offender Registration and Notification Act's delegation of authority to the attorney general to issue regulations violates the non-delegation doctrine); *PDR Network, LLC* v. *Carlton & Harris Chiropractic Inc.*, 139 S. Ct. 478 (2018) (mem.) (No. 17-1705) (to be argued Mar. 25, 2019) (whether the Hobbs Act requires a federal court to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act); and this case, which asks whether the Court should overrule the doctrine that makes an agency's interpretation of its own ambiguous regulation "controlling unless 'plainly erroneous or inconsistent with the regulation,'" *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (expanding on the standard originally articulated by *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Of the various deference rules, none has created as much mischief as the *Auer* doctrine and, therefore, of the various cases currently before the Court implicating deference to agencies, no case is as important as this one. As Petitioner has explained, *Auer* deference permits administrative "agencies to circumvent the critical requirements of the APA," adds "intolerable unpredictability into the legal system," and is "incompatible with the basic principle that the one who makes the law should not also interpret it." Pet'r Br. 25-26. *Amici* agree.

This mischief is not merely theoretical. Through "subregulatory" interpretation, agencies can change binding law "based on nothing more than a brief filed in court, a letter posted on a website, or an internal memorandum sent to agency staff." *Id.* at 21, 52; see, *e.g.*, *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 59 (2011) ("[W]e defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s].'" (quoting *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 208 (2011))).

Part I of this brief explains why *amici* agree with Petitioner that this Court should overrule *Auer*. But Part I also articulates an alternative basis for overruling *Auer*, without overruling *Seminole Rock*. In particular, Part I explains how, read carefully, *Seminole Rock* was a straightforward application of the factors articulated by this Court months earlier in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Seminole Rock* (and its progeny for decades thereafter) recognized that courts should defer to agency interpretations only if those interpretations were valid readings of the regulation, consistent with prior agency interpretations, and took into consideration reliance interests. *Auer* should be

overruled, therefore, not because it reaffirmed *Seminole Rock*, but because it severed *Seminole Rock* deference from its original anchoring in the *Skidmore* framework that helped guarantee notice and prevent arbitrariness in rulemaking.

Part II explains the practical problems that *Auer* has wrought by compelling deference to diverse subregulatory interpretations offered in a host of different formats (from regulatory preambles to non-binding internal memoranda to non-precedential decisions from quasi-judicial adjudicators) in all kinds of regulatory contexts. This, in turn, as Part II also illustrates, has left a trap for the unwary, requiring regulated parties to hunt for relevant subregulatory guidance and, if they are lucky to find it, hope that the agency will continue to adhere to it.

Finally, because the greatest number of requests by the government for *Auer* deference come in immigration cases arising from the BIA, Part III analyzes the circumstances under which the courts of appeals will grant *Auer* deference to BIA decisions (including non-precedential, single-member decisions), and uses that analysis to illustrate why granting *Auer* deference to quasi-judicial agencies is particularly problematic.

ARGUMENT

I. THE COURT SHOULD OVERRULE *AUER* BECAUSE IT EXCEEDS *SEMINOLE ROCK* PRINCIPLES.

As Petitioner has explained, *Auer* is incompatible with the Administrative Procedure Act because it allows agencies to issue subregulatory interpretations that bind the regulated public and the courts, but without any of the APA's procedural safeguards. Pet'r Br. 26-33. As a result of that opportunity for agencies

to (sub)regulate without public notice and comment, *Auer* has also injected intolerable unpredictability by inviting the promulgation of vague regulations and then compelling judicial deference to their subsequent, less-formal clarifications. Pet'r Br. 37-40. This, in turn, has created serious separation-of-powers problems by vesting the power to interpret vague regulations in the same branch of government that promulgated them while simultaneously curtailing the courts' obligation to independently interpret the law. Pet'r Br. 43-45.

Amici agree with these rationales and believe them sufficient to overrule *Auer*. But *amici* also would like to put before the Court an alternative basis for overruling *Auer* that focuses on a key, yet largely overlooked, distinction between *Auer* and *Seminole Rock* itself.

A careful review of the doctrinal context in which *Seminole Rock* was decided reveals that it originally had a far more modest and bounded significance that this Court recognized in the decades after *Seminole Rock*, but that the *Auer* Court did not sufficiently appreciate. The real problem with *Auer* was therefore not so much that it followed or reaffirmed *Seminole Rock*, but that it took one piece of dicta from *Seminole Rock* out of its larger doctrinal and historical context. In doing so, it announced a rule of deference to agency interpretations of regulations far more sweeping, categorical, and generous than *Seminole Rock* had originally recognized.

In short, *Seminole Rock* is best read in light of the framework for according weight to agency interpretations announced by the unanimous Court just six months earlier in *Skidmore*, 323 U.S. 134. See generally Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 Geo. J. L. & Pub. Pol'y 87 (2018). On December 4, 1944, Justice Jackson, in writing for the *Skidmore*

Court, observed that courts may give weight to agency interpretations on a case-by-case basis depending upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. If agency interpretations (1) accorded well with the text of the regulation and demonstrated thorough reasoning and validity, (2) were consistent with prior agency determinations, and (3) provided adequate notice to regulated entities and considered their reliance interests, then courts would give those interpretations weight and defer to them. On June 4, 1945, in *Seminole Rock*, in an 8-1 decision, the Court did not silently repudiate the larger framework that it had unanimously crafted six months earlier and announce a new rule of unquestioning deference to agency interpretations. Rather, *Seminole Rock* effectively applied the *Skidmore* framework to the controversy at hand, and for decades thereafter, the Court applied that bounded *Skidmore* framework when it was asked to defer to agency interpretations of their own regulations.

Most attention to *Seminole Rock* focuses on the famous statement that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. at 414. But that statement is dicta; it did not form the basis for the Court's decision in *Seminole Rock*. Instead, the operative (though less sonorous) sentence that explained the basis for the Court's decision was: "Our reading of the language of Section 1499.163(a)(2) of Maximum Price Regulation No. 188 and the consistent administrative interpretation of the phrase 'highest price charged during March, 1942' thus compel the conclusion that

respondent's highest price charged during March for crushed stone was 60 cents per ton, since that was the highest price charged for stone actually delivered during that month." *Id.* at 418 (footnote omitted). As reflected by that explanation, the Court considered several of the *Skidmore* factors in according weight to the agency's interpretation.

The *Seminole Rock* Court first considered the validity of the agency's interpretation by carefully reading what it called "the plain words" of the text of the regulation itself: "Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator." *Id.* at 414. The Court added that, in reading the regulation on its own, it might take into consideration "[t]he intention of Congress or the principles of the Constitution." *Id.* And the Court independently read those words of the regulation and arrived at its own judgment of what it meant: "As we read the regulation * * * rule [i] clearly applies to the facts of this case, making 60 cents per ton the ceiling price for respondent's crushed stone." *Id.* at 415.

Only after assuring itself that the agency comported well with the regulation's text did the Court then look at the nature of the guidance documents issued by the agency. And there it focused on the consistency and notice provided by the agency's interpretations. It underlined the fact that the interpretive bulletin issued by the Administrator had come out "concurrently" with the regulation itself. *Id.* at 417. It observed that the bulletin, entitled "What Every Retailer Should Know About the General Maximum Price Regulations" was made broadly available to manufacturers, wholesalers, and retailers. *Id.* It attributed significance to the fact that the agency's position had "uniformly been taken" by the Office of Price Administration "in the

countless explanations and interpretations given to inquirers affected by this type of maximum price determination." *Id.* at 417-18. And it grappled with, and disposed of as factually irrelevant, purported examples of agency inconsistency concerning its interpretation provided by the respondent in the case. *Id.* at 418 n.9.

Seminole Rock thus applied the factors laid out in *Skidmore* before according weight to the agency's interpretation of its own regulation. Despite the dicta, the Court did not blindly defer to the agency's interpretation of its own regulation. Rather, it first performed a searching, extended examination of the regulation's text on its own. *Id.* at 414-17. And when it looked at the agency's interpretation of the regulation, it credited it only because it had been consistent with prior agency statements, had been issued concurrently with the regulation itself, and had been promulgated publicly and broadly. It is then no surprise to learn that the government's brief in *Seminole Rock*, which Justice Murphy largely followed in drafting the decision, cited *Skidmore* and argued that "the language of the regulation compels the construction placed upon it by the Price Administrator" which, since the beginning, had been "consistently and repeatedly reaffirmed" in "[m]illions upon millions of individual transactions." Brief for the Petitioner, at 18, 20-21, *Seminole Rock*, 325 U.S. 410 (No. 914); see also Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the Seminole Rock Opinion*, Yale J. Reg.: Notice & Comment (Sept. 12, 2016), http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/.

This Court's decisions in the decades after *Seminole Rock* provide additional evidence that it was not the watershed decision that it has occasionally been made out to be. In the first two decades between 1945 and

1965, the Court cited *Seminole Rock* only once (in dissent), and when the Court did cite it, the Court often indicated that it stood for the rule that agency interpretations would be accorded deference only if they were consistent with prior interpretations, complied with notice requirements, and did not interfere with reliance interests.

Specifically, Justice Reed first cited *Seminole Rock* along with several other cases in his dissent in *Peters* v. *Hobby*, 349 U.S. 331 (1955), for the proposition that a "reasonable interpretation promptly adopted and long-continued" by the President and an administrative agency should be respected by the courts. *Id.* at 355. In the next citation in *Udall* v. *Tallman*, 380 U.S. 1 (1965), the Court deferred to the Secretary of the Interior's interpretation of two executive orders, citing the fact that "the Secretary has consistently construed both orders not to bar oil and gas leases; moreover, this interpretation has been made a repeated matter of public record. While the Griffin leases and others located in the Moose Range have been developed in reliance upon the Secretary's interpretation, respondents do not claim to have relied to their detriment upon a contrary construction." *Id.* at 4. In *Ehlert* v. *United States*, 402 U.S. 99 (1971), after concluding that the regulation contained some ambiguous language, the Court cited *Seminole Rock* for the rule that that "we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such." *Id.* at 105. In *Northern Indiana Public Service Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12 (1975) (per curiam), the Court cited *Seminole Rock* and deferred to an agency interpretation because it was "supported by the wording of the regulations and is consistent with prior agency decisions." *Id.* at 14. In

Ford Motor Credit Co. v. *Milhollin*, 444 U.S. 555 (1980), the Court cited *Seminole Rock* in upholding a Federal Reserve Board staff interpretation in part because the staff had "consistently construed the statute and regulations." *Id.* at 557. And in *Mullins Coal Co. of Virginia* v. *Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987), the Court upheld under *Seminole Rock* the Secretary of Labor's interpretation regarding the burden of proof needed to invoke a presumption of eligibility for black lung benefits, because it had been "with one exception, consistently maintained through Board decisions" and had been a "routine" feature of the standard of review in the courts of appeals. *Id.* at 159-60.

The precise date when the dicta in *Seminole Rock* came loose from the background doctrinal framework of *Skidmore* is a matter of some scholarly debate. See Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 Emory L.J. 47 (2015). But as these cases indicate, this Court in *Seminole Rock* and for decades thereafter applied *Seminole Rock* deference against a background assumption that the *Skidmore* factors of validity, agency consistency, and notice must first be considered and met before a court should accord deference to agency interpretations of regulations.

In *Auer*, however, the last threads of connection between *Skidmore* and *Seminole Rock* were finally severed. The *Auer* Court quoted the dicta from *Seminole Rock* and expressly declared that to be a "deferential standard," easily met even in a case where the agency announced its interpretation of the regulation for the first time in an *amicus* brief. "Because the salary-basis test is a creature of the Secretary [of Labor]'s own regulations, his interpretation of it is, under our jurispru-

dence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" 519 U.S. at 461 (citing *Seminole Rock*, 325 U.S. at 414).

The trouble with *Auer*, then, is that it ignored the preconditions that this Court had recognized in *Seminole Rock* for deferring to agency interpretations. It retained the punchline, but dropped the indispensable setup. This failing in *Auer* is not just a matter of deficient legal history, but of significant practical, real-world import because the preconditions it ignored were essential to fairness and due process in rule-making. *Auer* departed from the baseline requirement in *Seminole Rock* that courts defer to agency interpretations only when they are at least persuasive in their own right, consistent with prior agency interpretations, and have been officially and widely published, such that all regulated entities are on notice from the start. Shorn of these basic requirements, *Auer* deference liberates administrative agencies to be as arbitrary as they want to be. They can provide a binding interpretation years after a regulation is promulgated that is not the best reading of the regulation, departs sharply from previous agency interpretations, and is offered in anticipation of (or during) litigation with regulated parties who relied on a previous agency interpretation (or just the most natural reading of the regulation itself), yet still prevail in court.

Such a permission slip removes transparency and accountability from the rule-making process. Because subregulatory interpretations are not subject to the public notice and comment requirement under the APA, 5 U.S.C. § 553(b)(A), the only step along the process at which to pressure-test the soundness of these interpretations is at the judicial review stage. But *Auer* deference effectively defangs that stage, enabling

agencies to survive judicial review with a mere showing that their latest interpretation is not "plainly erroneous." Arranged thus, the rulemaking process removes the burden from agencies critical to ensuring transparency and accountability to either "pay now" at the notice or comment period or "pay later" at the judicial review stage to show that their interpretations are valid, consistent, and take reliance interests into account.

Affording deference to such subregulatory interpretations under these conditions promotes arbitrary government and tends to harm all regulated persons—corporate and individual, and among individuals, particularly our nation's immigrant community that *amici* serve.

II. THE MANY DISPARATE FORMS OF SUBREGULATORY INTERPRETATION TO WHICH *AUER* DEFERENCE APPLIES HARM THE REGULATED PUBLIC.

As Petitioner correctly observes, "*Auer* allows an agency to change the meaning of its regulations (including reversal of pre-existing positions) * * * regardless whether the new interpretation is the best one." Pet'r Br. 24. With scarcely any warning, opportunity for public participation, or political accountability, administrative agencies can change course midstream. *Id.* at 22; see also *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1221 (2015) (Thomas, J., concurring in the judgment) (explaining that *Auer* deference "allows agencies to change the meaning of regulations at their discretion and without any advance notice to the parties").

Amici agree. Putting aside the incentives and subjective motivations of agency rule-makers, *amici* direct this Court's attention to the profoundly harmful ways

that *Auer* deference impacts regulated entities and the public at large. *Auer* permits agencies to dramatically change the rules of the game with impunity, while members of the regulated public—individuals, small businesses, and corporations—are deprived of advance warning and regulatory stability. Under the shadow of *Auer*, entities and individuals have difficulty predicting which rules will apply when agencies issue novel, subregulatory interpretations that function as if they have the force of law. See *Perez*, 135 S. Ct. at 1211-12 (Scalia, J., concurring in the judgment) ("[J]udge-made doctrines of deference * * * have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking" because "[a]gencies may now use these rules not just to advise the public, but also to bind them.").

A. A strong form of *Auer* deference does not account for the many different forms of subregulatory interpretation to which courts have applied it.

Subject to two exceptions recently adopted by this Court,[2] *Auer* purports to make an agency's interpretation of its own ambiguous regulation "controlling unless 'plainly erroneous or inconsistent with the regulation.'" 519 U.S. at 461. The Court made that broadly phrased holding in the context of resolving a dispute over the meaning of the Department of Labor's regulations regarding an employee's exemption from overtime pay. *Id.* at 455. The Court deferred to the Secretary of Labor's interpretation set forth "in an *amicus*

---

[2] *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* deference is inappropriate for agency interpretation of regulation that merely parrots the statutory text), and *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158-59 (2012) (denying *Auer* deference to agency interpretation of regulation that failed to provide proper notice to regulated entities).

brief filed at the request of the Court" because the regulation at issue, "the salary-basis test," "is a creature of the Secretary's own regulations." *Id.* at 461. In fact, as petitioner notes (Pet'r Br. 9, 29-30), this Court has also applied *Auer* deference to an "internal" agency memorandum that "appears to have [been] written in response" to the litigation at issue, see *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007); see also *Chase Bank*, 562 U.S. at 197; *Coeur Alaska, Inc.* v. *Se. Alaska Conservation Council*, 557 U.S. 261, 278 (2009), and to private letters issued by an agency during the pendency of litigation, *Thorpe* v. *Hous. Auth. of Durham*, 393 U.S. 268, 276 & nn.22-23 (1969).

Together, the Court's broad phrasing in *Auer*, coupled with its willingness to defer to subregulatory interpretations of which parties subject to the regulation (no less, the public at large) lacked notice have sent a strong signal to the lower courts that subregulatory interpretations meeting the "plainly erroneous or inconsistent" standard must receive controlling deference "no matter how informal the pronouncement in which the agency advances its interpretation." *Go* v. *Holder*, 744 F.3d 604, 611 (9th Cir. 2014) (Wallace, J., concurring).

Accordingly, requests by the government for *Auer* deference have not been made just with respect to the types of subregulatory interpretations that this Court has seen. As a recent study shows, the courts of appeals have applied *Auer* to: (1) an agency's appellate litigation position embodied in its own party brief;[3]

---

[3] *See, e.g.*, *Drake* v. *FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002) (applying *Auer* deference to the Federal Aviation Administration's interpretation of its own regulation advanced during litigation where the position was not inconsistent with the agency's prior statements); *Bigelow* v. *Dep't of Def.*, 217 F.3d 875, 878 (D.C. Cir.

(2) so-called "non-legislative" or "publication" rules issued by agencies in letters, manuals, memoranda, handbooks, program statements, bulletins, guidance documents, and classifications;[4] (3) informal adjudications;[5] (4) non-textual interpretations;[6] (5) regulatory

---

2000) (finding for the Department of Defense and giving *Auer* deference to "the interpretation advanced in the Department's brief").

[4] *See, e.g., Siskiyou Reg'l Educ. Project* v. *U.S. Forest Serv.*, 565 F.3d 545, 548, 553-54 (9th Cir. 2009) (deferring to the interpretation of a "mining-related directive" set forth in a "Memorandum to Regional Foresters" issued by the Forest Service); *Belt* v. *EmCare, Inc.*, 444 F.3d 403, 415-16 (5th Cir. 2006) (applying *Auer* deference to informal Department of Labor regulatory interpretations contained in a nonbinding opinion letter, a Field Operations Handbook, and an *amicus* brief); *Archuleta* v. *Wal-Mart Stores, Inc.* (*In re Wal-Mart Stores, Inc., Fair Labor Standards Act Litig.*), 395 F.3d 1177, 1184-85 (10th Cir. 2005) (applying *Auer* deference to the Department of Labor's opinion letters that explain how regulations related to the Fair Labor Standards Act apply in particular circumstances); *LaFleur* v. *Whitman*, 300 F.3d 256, 277 (2d Cir. 2002) (applying *Auer* deference to the Environmental Protection Agency's interpretation and application of the "Standard Industrial Classification Manual" in determining whether heightened permitting requirements applied to a municipal waste facility under the Clean Air Act).

[5] *See, e.g., Intermodel Techs., Inc.* v. *Peters*, 549 F.3d 1029, 1031 (6th Cir. 2008) (applying *Auer* deference to uphold the National Highway Traffic Safety Administration's denial of a tractor-trailer manufacturer's application for temporary exemption from a tractor-trailer safety standard).

[6] *See, e.g., Ohio Valley Envtl. Coal.* v. *Aracoma Coal Co.*, 556 F.3d 177, 213-14 (4th Cir. 2009) (applying *Auer* deference to the U.S. Army Corps of Engineers' issuance of four permits allowing coal mining operations based on a history of "consistent administrative practice" and consistent reliance on Environmental Protection Agency guidance).

preambles;[7] (6) litigation positions before administrative adjudications;[8] (7) non-precedential adjudications, such as unpublished single-member decisions of the Board of Immigration Appeals;[9] (8) precedential adjudications;[10] (9) hybrid orders,[11] and (10) briefs of non-government parties asserting an agency's prior interpretation.[12] See generally William Yeatman, Note, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L.J. 515, 536-43 (2018) (describing forms of subregulatory

---

[7] *See, e.g.*, *Halo* v. *Yale Health Plan*, 819 F.3d 42, 53 (2d Cir. 2016) (applying *Auer* deference to preamble to regulation prescribing ERISA benefits claims procedures).

[8] *See, e.g.*, *Ass'n of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998) (applying *Auer* deference to the Commissioner of the Social Security Administration's interpretation of the Coal Act where the Commissioner "consistently" interpreted the Act the same way at the administrative level).

[9] *See* Part III(A), *infra*.

[10] *See* Part III(A), *infra*; *see also, e.g.*, *Excel Corp.* v. *U.S. Dep't of Agric.*, 397 F.3d 1285, 1296 (10th Cir. 2005) (deferring to a Department of Agriculture Judicial Officer's interpretation of a regulation under *Auer* since the interpretation was neither plainly erroneous nor inconsistent with prior determinations).

[11] *See, e.g.*, *Pub. Lands for the People, Inc.* v. *U.S. Dep't of Agric.*, 697 F.3d 1192, 1199 (9th Cir. 2012) (applying *Auer* deference to a Forest Service decision, based on a 45-day comment period, that limited motor vehicle access on certain roads in the El Dorado National Forest).

[12] *See, e.g.*, *W. Radio Servs. Co.* v. *Qwest Corp.*, 678 F.3d 970, 984-85 (9th Cir. 2012) (applying *Auer* deference to the Federal Communications Commission's interpretation of the term "interconnection" in a suit between a commercial mobile radio service and a local carrier challenging the approval of an interconnection agreement by the Oregon Public Utilities Commission); *Wal-Mart Stores*, 395 F.3d at 1184-85 (applying *Auer* deference to the Department of Labor's opinion letters in a suit brought by pharmacists against their employer for violations of the Fair Labor Standards Act).

interpretation); *id.* at 545-46 tbl.2 (presenting data on the application of *Chevron*, *Auer*, and *Skidmore* deference to these various forms of subregulatory interpretation).

In fact, because *Auer*'s potential applicability is so pervasive, one recent empirical study counted 429 examples of the courts of appeals applying *Auer* in published (never mind unpublished) decisions between 1993 and 2013, with the government prevailing in 74% of those cases.[13] *Id.* at 519, 536 n.124. And because agency requests for *Auer* deference arise most in labor and employment and immigration cases—in particular, immigration cases arising from the BIA, see Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 Ohio St. L.J. 813, 830-31 & tbl.3 (2015)—the issue is of utmost important to *amici*.

B. The evils of *Auer* are most notable in their effects on the regulated public.

Precisely because *Auer* applies to so many disparate forms of subregulatory interpretation, the (sub)regulated public lacks recourse to a stable body of rules. See *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in the judgment) ("Only the text of a regulation goes through the procedures established by Congress for agency rulemaking," and "it is that text on which the public is entitled to rely."). To conform their conduct,

---

[13] Apparently emboldened by its success rate, the government has even claimed that one agency's interpretation of another's ambiguous regulation is entitled to deference. *See, e.g, L.D.G.* v. *Holder*, 744 F.3d 1022, 1028-29 (7th Cir. 2014) (rejecting the request by the Department of Justice's Office of Immigration Litigation for *Auer* deference to the interpretations by the BIA—another component of the Justice Department—of DHS's U-Visa regulations).

regulated parties often must retain experienced counsel, or at minimum comb through poorly organized government websites or have access to a legal-research database for potentially relevant guidance (assuming it is even in the public domain). Then, regulated parties must guess whether administrative officials will continue to apply those policies as political winds change. See Pet'r Br. 39 ("Such policy shifts often occur when there is a change in Administrations."). *Auer* deference thus creates myriad traps for the unwary across most—if not all—federally regulated contexts, and, as *amici* have learned from experience, particularly undermines "efficiency, fairness, and predictability" in immigration law. *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1987 (2015).

Consider, for instance, subregulatory interpretations concerning parole and deferred action. In November 2013 and 2014, the DHS and U.S. Citizenship & Immigration Service ("USCIS") adopted explicit subregulatory memoranda governing parole considerations for family members of individuals enlisted in the U.S. Armed Forces. See U.S. Dep't of Homeland Sec., Families of U.S. Armed Forces Members and Enlistees (2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf; U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., PM-602-0091, Policy Memorandum: Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under INA § 212(a)(6)(A)(i) (2013), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf. Although those policies remain officially in effect, see U.S. Citizenship & Immigration Servs., *Discretionary Options for Military Members, Enlistees and*

Their Families, https://www.uscis.gov/military/discretionary-options-military-members-enlistees-and-their-families (last visited Jan. 31, 2019), Executive Branch officials have declined to apply their own subregulatory policies as written. See Tara Copp, *As Many as 11,800 Military Families Face Deportation Issues, Group Says*, Mil. Times, https://www.militarytimes.com/news/your-military/2018/04/01/as-many-as-11800-military-families-face-deportation-issues-group-says/ (Apr. 1, 2018) ("An earlier 'parole in place' program that was previously championed by Vice President Mike Pence to give relief to military families is no longer being utilized due to stricter enforcement of deportation proceedings under [President] Trump.").

As another example, consider subregulatory policy surrounding Form I-693 (a document used for reporting medical-examination results to USCIS). Under 8 U.S.C. § 1182(a)(1), any non-citizen "who is determined * * * to have a communicable disease of public health significance * * * [is] ineligible to receive visas and ineligible to be admitted to the United States." Such visa applicants and applicants for admission must submit a medical examination—using Form I-693—from a "civil surgeon." See 42 C.F.R. § 34.2(c). Before 2002, Form I-693 was considered valid, so long as it was submitted promptly; if adjudication was delayed, the form's validity was automatically extended. See U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., PA-2014-005, Policy Alert: Validity Period of the Medical Certification on the Report of Medical Examination and Vaccination Record (Form I-693) (2014), https://www.uscis.gov/policymanual/Updates/20140530-I-693Validity.pdf [hereinafter 2014 Policy Alert]. That approach was not dictated by statute or regulation, as "USCIS historically has es-

tablished the validity period [for Form I-693] by policy." U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., PA-2018-09, Policy Alert: Validity of Report of Medical Examination and Vaccination Record (Form I-693) (2018), https://www.uscis.gov/policymanual/Updates/20181016-I-693Validity.pdf. But in 2014, USCIS suddenly changed its subregulatory "policy" to make Form I-693 expire after one year—and, in doing so, the agency was not obliged to solicit public comment. See 2014 Policy Alert, *supra*. As *amici* could have predicted, adjudicative delays ensued and Form I-693's expired in numerous cases. Admission was delayed while families and businesses obtained new medical examinations (which generally cost hundreds of dollars per case). Without warning, the agency's subregulatory policy imposed significant costs on countless families and businesses.

These examples confirm that "*Auer* deference should be set aside because it is fundamentally at war with basic principles of predictability and public notice." Pet'r Br. 36-37. Regulatory deference may very well motivate those who promulgate regulations to "speak vaguely and broadly." See *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part). But *Auer*'s true sin is its impact on the *regulated*, not the *regulator*. In this subregulatory world, where agency discretion eclipses fundamental fairness, rights will often rise and fall with the quality of counsel—not the merits of a case. Whatever the fate of *Chevron* and the broader administrative state, *Auer* serves only to insulate from judicial review opaque rules promulgated by unaccountable officials according to unknowable methods.

III. *AUER* DEFERENCE IS PERNICIOUS WHERE QUASI-JUDICIAL AGENCIES LIKE THE BIA INTERPRET REGULATIONS THROUGH ADJUDICATION.

Auer's flaws apply equally, if not with greater force, to quasi-judicial agencies that interpret regulations through case-by-case adjudication.[14] This Court has long recognized that, "in administrative proceedings of a quasi-judicial character," liberty must be "protected by the rudimentary requirements of fair play." *Morgan* v. *United States*, 304 U.S. 1, 14-15 (1938). Cloaked in judicial garb, however, an administrative agency can conduct binding adjudications that "change the meaning of regulations * * * without any advance notice to the parties." *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring in the judgment); see also *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part) ("[W]hen an agency interprets its *own* rules * * * the power to prescribe is augmented by the power to interpret."). Moreover, *Auer* deference shields the agency's purported power to "say what its own rules mean" from plenary judicial review. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 654 (1996).

Amici submit that this regime is incompatible with the "cherished judicial tradition embodying the basic concepts of fair play," *Morgan*, 304 U.S. at 22, particularly in the immigration context. *First*, at the most basic level, quasi-judicial agencies are not properly

---

[14] The term "quasi-judicial" refers to "an executive or administrative official's adjudicative acts." *Quasi-Judicial*, Black's Law Dictionary (10th ed. 2014); *see also Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 629 (1935) (discussing Congress' authority to create quasi-legislative and quasi-judicial agencies).

constituted to exercise judicial power. *Second*, and relatedly, quasi-judicial agencies are not better equipped to interpret regulations, particularly considering fiscal and operational constraints within the Executive Branch. *Third*, the severity of deportation, as a punishment, counsels against abandoning fulsome judicial review of regulatory interpretations. *Amici* illustrate these flaws through an examination of the BIA, which underscores why subregulatory interpretation through quasi-judicial adjudication should be reviewed under traditional *Skidmore* principles.

A. Most circuits give *Auer* deference to the BIA's interpretation of ambiguous regulations.

The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, and its implementing regulations, 8 C.F.R. § 100.1 *et seq.*, designate the process for removing non-citizens from the United States. Generally, Immigration Judges ("IJs") conduct initial removal proceedings and the BIA reviews appeals from removal orders. See 8 U.S.C. § 1229a(a)(1), (c)(5). According to the Department of Justice ("DOJ"), the majority of BIA appeals involve orders of removal and applications for relief from removal.[15]

The BIA is a component of the DOJ's Executive Office for Immigration Review, and is considered the highest administrative body for interpreting immigration law. See Bd. of Immigration Appeals, U.S. Dep't of Justice, Board of Immigration Appeals Practice Manual, ch. 1.2(a)-(b), https://www.justice.gov/eoir/page/file/1103051/download (last updated Oct. 16,

---

[15] *See* Exec. Office for Immigration Review, U.S. Dep't of Justice, Board of Immigration Appeals, https://www.justice.gov/eoir/board-of-immigration-appeals (last visited Jan. 31, 2019).

2018) [hereinafter *BIA Practice Manual*]. The BIA generally does not conduct courtroom proceedings or hear oral arguments.[16] Decisions are rendered either by a single Board Member, a three-member panel, or, rarely, the full Board. *Id.*, ch. 1.3(a). The BIA's orders are final, unless stayed, modified, rescinded, or overruled by the Board, the Attorney General, or a federal court. *Id.* ch. 1.4(d) (citing 8 C.F.R. § 1003.1(d)(7), (g)). Decisions released in "published" form constitute binding precedent for the Board and the Immigration Courts. *Id.* ch. 1.4(d)(i) (citing 8 C.F.R. § 1003.1(g)). But the vast majority of BIA decisions are unpublished and, while binding on the parties, are not considered precedent. *Id.* ch. 1.4(d)(i)-(ii).

Nearly every circuit has held that the BIA is entitled to *Auer* deference when interpreting ambiguous immigration regulations, unless "plainly erroneous or inconsistent with the regulation." See *Auer*, 519 U.S. at 461. As the Sixth Circuit has recently explained, "we * * * afford substantial deference to [the BIA's] interpretation of the INA and accompanying regulations," the latter of which "are controlling unless plainly erroneous or inconsistent with the regulation." *Hernandez-Perez* v. *Whitaker*, 911 F.3d 305, 312 (6th Cir. 2018).[17]

---

[16] *See* note 15, *supra*.

[17] The Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits agree. *See, e.g.*, *Gomez* v. *Lynch*, 831 F.3d 652, 655-56 (5th Cir. 2016); *Maldonado* v. *Lynch*, 786 F.3d 1155, 1164 (9th Cir. 2015) (en banc); *Mansour* v. *Holder*, 739 F.3d 412, 414 (8th Cir. 2014); *Li Shan Chen* v. *U.S. Attorney Gen.*, 672 F.3d 961, 965 n.2 (11th Cir. 2011) (per curiam); *Kiorkis* v. *Holder*, 634 F.3d 924, 928 (7th Cir. 2011); *Barnes* v. *Holder*, 625 F.3d 801, 803-04 (4th Cir. 2010); *Kaplun* v. *Attorney Gen.*, 602 F.3d 260, 265 (3d Cir. 2010); *Perriello* v. *Napolitano*, 579 F.3d 135,

Consider, for example, *Zhang* v. *Holder*, 617 F.3d 650 (2d Cir. 2010). There, the Second Circuit gave *Auer* deference to the BIA's interpretation of 8 C.F.R. § 1003.2(a)—a regulation governing the Board's *sua sponte* authority to reopen final removal proceedings. In *Matter of Armendarez-Mendez*, 24 I. & N. Dec. 646, 660 (B.I.A. 2008), the BIA concluded that the so-called "departure bar" deprived it of jurisdiction to consider motions to reopen. *Zhang*, 617 F.3d at 652. Deferring to that legal interpretation of Section 1003.2(d), the Second Circuit held that the BIA's reading was not "plainly erroneous" and thus denied the petition for review. *Id.* The court explained that, although it was "not without flaws," the BIA's legal "construction * * * is entitled to deference." *Id.* at 655. The court also felt obliged to note that "the BIA's construction [wa]s anything but airtight," and restrained itself from "creat[ing] an exhaustive list" of concerns. *Id.* at 660. "Were we writing on a blank slate," the court emphasized, "we might reach a different conclusion." *Id.*[18]

A majority of circuits apply *Auer* deference even to unpublished single-member BIA decisions.[19] In the *Chevron* context, courts find that in issuing un-

---

138 (2d Cir. 2009); *Halmenschlager* v. *Holder*, 331 F. App'x 612, 619 (10th Cir. 2009).

[18] Such reluctant deference is not unique to the immigration context. *See, e.g.*, *Qwest Corp.* v. *Colo. Pub. Utils. Comm'n*, 656 F.3d 1093, 1101 (10th Cir. 2011) (reluctantly deferring to the FCC's amicus brief even though the court "would not necessarily reach the same result if not required to defer"); *Wal-Mart Stores*, 395 F.3d at 1181-82 (deferring to the Department of Labor's definition of "salary" expressed in opinion letters even though "we may well have defined *salary* rather differently than the DOL").

[19] *See Gourzong* v. *Attorney Gen.*, 826 F.3d 132, 136 & n.2 (3d Cir. 2016) (describing split of authority and collecting cases).

published decisions, "the BIA is not exercising its authority to make a rule carrying the force of law, and thus the opinion is not entitled to *Chevron* deference." *Martinez* v. *Holder*, 740 F.3d 902, 909-10 (4th Cir. 2014) (collecting cases); see also *Dhuka* v. *Holder*, 716 F.3d 149, 154-56 (5th Cir. 2013). Yet in the *Auer* context, many circuits find that "the BIA is entitled to significant deference when it * * * interprets an immigration regulation in a single-member, nonprecedential opinion." *Gomez* v. *Lynch*, 831 F.3d 652, 655 (5th Cir. 2016). They reason that, under *Auer*, "the agency's interpretations, even if relatively informal * * *, are given 'controlling weight.'" *Id.* at 655-56; see also *Marsour* v. *Holder*, 739 F.3d 412, 414, 417 (8th Cir. 2014) (extending "the deference afforded by * * * *Auer*" to regulatory interpretation in an "unpublished BIA decision"); *Linares Huarcaya* v. *Mukasey*, 550 F.3d 224, 227-30 (2d Cir. 2008) (per curiam) (extending *Auer* deference to an unpublished decision, despite recognizing "the potential for redundancy in the BIA's interpretation").[20]

---

[20] The Ninth Circuit disagrees. *Lezama-Garcia* v. *Holder*, 666 F.3d 518, 532 (9th Cir. 2011) (holding that a "one-member, nonprecedential, BIA order" should be given "no deference under *Auer* as an agency interpretation of a regulation"). As explained, most circuits have similarly declined to apply *Chevron* to unpublished BIA decisions. *See Joseph* v. *Holder*, 579 F.3d 827, 833 (7th Cir. 2009) (citing *Quinchia* v. *U.S. Atty. Gen.*, 537 F.3d 1312, 1314 (11th Cir. 2008); *Rotimi* v. *Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007); *Garcia-Quintero* v. *Gonzales*, 455 F.3d 1006, 1012-13 (9th Cir. 2006)).

B. Affording *Auer* deference to BIA adjudications is particularly problematic.

With this essential background in mind, *amici* submit that *Auer* deference is unjustified in the immigration context for at least three fundamental reasons.[21]

1. Our constitutional system requires federal courts to "exercise independent judgment in determining that a regulation properly covers the conduct of regulated parties." See *Perez*, 135 S. Ct. at 1219 (Thomas, J., concurring in the judgment). *Auer* short-circuits that safeguard, demanding, instead, that judges defer to agency interpretations that are not plainly erroneous or otherwise inconsistent with the regulation. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). This deference doctrine therefore amounts to "a transfer of the judge's exercise of interpretive judgment to the agency." See *Perez*, 135 S. Ct. at 1219 (Thomas, J., concurring in the judgment).

The BIA's exercise of quasi-judicial power is no exception. While Board Members and IJs are considered "independent" adjudicators, see *BIA Practice Manual*, ch. 1.2(c), they are, doubtless, components of the Executive Branch housed within DOJ and subject to oversight by the Attorney General. Significantly, these Executive Branch officials lack the "structural protections for independent judgment adopted by the Fram-

---

[21] Prior to deciding *United States* v. *Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that agency actions lacking requisite formality, including interpretive rules, do not warrant *Chevron* deference), the Court held that *precedential* BIA decisions interpreting the Immigration and Nationality Act would receive *Chevron* deference. *See INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). *Amici* submit that the Court may want to revisit that holding in an appropriate case. The Court need not do so here, so *amici* do not urge the Court to address the issue.

ers"—*i.e.*, Article III's life tenure and salary protections. See *Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring in the judgment); Jason Dzubow, *Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge (part 2)*, The Asylumist (Oct. 5, 2016), https://www.asylumist.com/2016/10/05/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-2/ (explaining dismissal of BIA members due to the Attorney General's disagreement with opinions). Thus, as the most basic level, the BIA is "not properly constituted to exercise the judicial power under the Constitution," which suggests that any "transfer of interpretive judgment raises serious separation-of-powers concerns." *Perez*, 135 S. Ct. at 1220.

2. Complicated and technical regulatory matters often require expertise, along with the exercise of "judgment grounded in policy concerns." See *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)). This confirms that agencies—not courts—should promulgate regulations; but it says nothing about "who should interpret regulations." See *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part). Put another way: "[T]he purpose of interpretation is * * * [n]ot to make policy, but to determine what policy has been made." *Id.* Federal judges are up to that task, often more so that administrative agencies. See *Perez*, 135 S. Ct. at 1222-23 (Thomas, J., concurring in the judgment) (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")).

Auer deference is accordingly at its nadir when regulatory interpretations do not reflect the agency's "fair and considered judgment on the matter in question."

See *SmithKline Beecham Corp.*, 567 U.S. at 155. Experience has taught that—given its crippling workload, inadequate funding, and ever-expanding backlog of cases[22]—the BIA is not sufficiently equipped to "say what its own rules mean." Manning, *supra*, at 654. Courts and commentators alike have recognized that, in the immigration context, quasi-judicial adjudication has "fallen below the minimum standards of legal justice." *Benslimane* v. *Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005). At points, the BIA has been deciding cases at the rate of 7-10 minutes per Board Member, per case. See Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. Times (Jan. 5, 2003), http://articles.latimes.com/2003/jan/05/nation/na-immig5 (cited in *Kadia* v. *Gonzales*, 501 F.3d 817, 820 (7th Cir. 2007)).[23]

---

[22] The backlog increased from approximately 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days. U.S. Gov't Accountability Office, GAO-17-438, Immigration Courts: Actions Needed to Reduce Case Backlog and Long-Standing Management and Operational Challenges 22 (2017).

[23] Criticism of the Board has been severe. *See, e.g.*, *Cruz Rendon* v. *Holder*, 603 F.3d 1104, 1111 n.3 (9th Cir. 2010) ("We are deeply troubled by the IJ's conduct in this case, which exhibits a fundamental disregard for the rights of individuals who look to her for fairness."); *Wang* v. *Attorney Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."); *Mohammed* v. *Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005) ("Not only was the BIA's opinion an example of sloppy adjudication, it contravened considerable precedent."); *Galina* v. *INS*, 213 F.3d 955, 958 (7th Cir. 2000) ("The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the [BIA] in this as in other cases.").

Yet, despite the BIA's shortcomings (understandable as they perhaps may be), *Auer* nevertheless compels federal judges to afford significant deference to interpretations of ambiguous immigration regulations. And as previously explained, some circuits have even extended *Auer* deference to single-judge, unpublished BIA decisions. See, *e.g.*, *Gomez*, 831 F.3d at 655; *Mansour*, 739 F.3d at 414; *Linares Huarcaya*, 550 F.3d at 227-30. That practice is misguided. The BIA's informal adjudicatory processes do not live up to the "cherished judicial tradition." See *Morgan*, 304 U.S. at 22. As the Ninth Circuit correctly explained in *Lezama-Garcia* v. *Holder*, 666 F.3d 518 (9th Cir. 2011), single-member BIA orders are "non-precedential," often neglect to "explain [their] reasoning," and therefore fail to "reflect the agency's fair and considered judgment." *Id.* at 532; *Auer*, 519 U.S. at 462. Put simply: "Deference is earned; it is not a birthright." See *Kadia*, 501 F.3d at 821.

3. Deportation is a "drastic measure," comparable to "banishment of exile." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). And often, this "particularly severe penalty" will be more important to non-citizens than "any potential jail sentence." *Lee* v. *United States*, 137 S. Ct. 1958, 1968 (2017) (quoting *Padilla* v. *Kentucky*, 559 U.S. 356, 365, 368 (2010)). Recognizing the "grave nature of deportation," this Court has taken great care when reviewing removal cases. See *Jordan* v. *De George*, 341 U.S. 223, 231 (1951) (reviewing removal provision under the void-for-vagueness doctrine); see also *Reno* v. *Flores*, 507 U.S. 292, 306 (1993) (holding that the Fifth Amendment entitles non-citizens to due process in removal proceeding); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (holding that ambiguities in deportation provisions should be construed in favor of non-citizens). Likewise, the federal courts

have consistently tried to "promote efficiency, fairness, and predictability" in immigration law. *Mellouli*, 135 S. Ct. at 1987.

But *Auer* deference compels judges to abandon fulsome checks on the severity of deportation. See *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring in the judgment) ("When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check."). As previously explained, the majority of BIA appeals concern removal orders and applications for relief from removal. The BIA's interpretation of an ambiguous regulation often will be outcome-determinative. See, *e.g.*, *Zhang*, 617 F.3d at 660 (denying petition for review, even though the BIA's interpretation of regulation was "anything but airtight"). So long as *Auer* remains good law, however, Article III judges will be all-but-powerless to "serve as a 'check'" on those who administer and enforce the immigration laws. See *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment).[24]

* * *

For these reasons, *Auer* deference should not apply where quasi-judicial agencies interpret regulations through adjudication—and particularly not with re-

---

[24] When *Auer* deference applies, courts are necessarily precluded from construing regulatory ambiguities in favor of non-citizens. *See Cardoza-Fonseca*, 480 U.S. at 449. But fundamental rules of construction should overcome doctrines of administrative deference. *See Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring in the judgment) ("[R]egulations should be interpreted like any other law."); *see also Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 668-69 (2007) (invoking the surplusage canon when interpreting a regulation); *Long Island Care at Home*, 551 U.S. at 170 (invoking the general-specific canon when interpreting a regulation).

spect to "relatively informal" non-precedential interpretations offered by understaffed and underfunded agencies like the BIA. Contrast *Gomez*, 831 F.3d at 655-56. Compelling deference to such decisions places reviewing courts "in the impossible position of having to uphold as reasonable on Tuesday one construction that is completely antithetical to another construction [that the court] affirmed as reasonable the Monday before." *Lin* v. *U.S. Dep't of Justice*, 416 F.3d 184, 190 (2d Cir. 2005); see also *Henry* v. *INS*, 74 F.3d 1, 6 (1st Cir. 1996) ("An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.").

Applying traditional *Skidmore* principles, however, would avoid this problem. Quasi-judicial agencies like the BIA would receive deference for only carefully reasoned, long-held positions, according to the care and logical power of their decisions—not simply because of their status as quasi-judicial agency adjudicators. *Cf. SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle Street, Suite 1300
Chicago, IL 60604
(312) 660-1613

RUSSELL ABRUTYN
WILLIAM A. STOCK
AMERICAN IMMIGRATION LAWYERS ASSOCIATION
1331 G Street, N.W. Suite 300
Washington, D.C. 20005
(202) 507-7600

JEAN-CLAUDE ANDRÉ *
ANDREW B. TALAI
GERRY B. HIRSCHFELD
SIDLEY AUSTIN LLP
555 W. Fifth Street, Suite 4000
Los Angeles, CA 90013
(213) 896-6000
jcandre@sidley.com

DEREK A. WEBB
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

January 31, 2019

* Counsel of Record

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,
Petitioner,
v.
ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC., THE AMERICAN LEGION, AMERICAN VETERANS, DISABLED AMERICAN VETERANS, MILITARY OFFICERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF COUNTY VETERANS SERVICE OFFICERS, PARALYZED VETERANS OF AMERICA, VETERANS OF FOREIGN WARS OF THE UNITED STATES, AND VIETNAM VETERANS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ROMAN MARTINEZ
Counsel of Record
BENJAMIN W. SNYDER
GREGORY B. IN DEN BERKEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Amici Curiae
(additional counsel listed on inside cover)

KEVIN J. BARTLETT
National Judge Advocate
The American Legion
National Headquarters
700 N. Pennsylvania St.
Indianapolis, IN 46206
(317) 630-1200

Counsel for The American Legion

CHRISTOPHER J. CLAY
General Counsel
MEGAN B. HALL
Assistant General Counsel
DISABLED AMERICAN VETERANS
3725 Alexandria Pike
Cold Spring, KY 41076
(859) 442-2043

Counsel for Disabled American Veterans

JOHN MUCKELBAUER
General Counsel
VFW National Headquarters
406 W. 34th Street
Kansas City, MO 64111
(816) 968-1140

Counsel for Veterans of Foreign Wars of the United States

KELSEY YOON
VIETNAM VETERANS OF AMERICA
8719 Colesville Road
Suite 100
Silver Spring, MD 20910
(301) 335-2183

Counsel for Vietnam Veterans of America

LEONARD J. SELFON
General Counsel
LINDA E. BLAUHUT
Deputy General Counsel
PARALYZED VETERANS OF AMERICA
801 18th Street, NW
Washington, DC 20006
(202) 416-7629

Counsel for Paralyzed Veterans of America

QUESTION PRESENTED

Whether the Court should overrule *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997).

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Interest of *Amici Curiae* 1

Introduction and Summary of Argument 6

Argument 8

I. VA's Track Record Illustrates The Problems With *Auer* Deference 8

A. VA Undermines The Rule Of Law When Promulgating And Interpreting Its Own Regulations 10

1. VA Is Purposely Vague 10

2. VA Interpretations Are Unreasonable 14

3. VA Interpretations Are Inconsistent 18

B. Hard Data Corroborates VA's Unreasonableness 21

II. The Pro-Veteran Canon Is A Valid Tool Of Regulatory Interpretation 23

A. The Pro-Veteran Canon Has Deep Roots In American Law And Properly Informs The Interpretation Of Regulations 23

B. The Pro-Veteran Canon Applies Irrespective Of Whether *Auer* Is Overruled 26

Conclusion 29

TABLE OF AUTHORITIES

Page(s)

CASES

Bartlett v. McDonald,
No. 13-1867, 2014 WL 4748597 (Vet. App. Sept. 24, 2014) 18

Bates v. Shinseki,
No. 08-1453, 2012 WL 1971327 (Vet. App. June 4, 2012) 16

Boone v. Lightner,
319 U.S. 561 (1943) 8, 23

Brown v. Gardner,
513 U.S. 115 (1994) 17, 24, 25, 26

Cantrell v. Shulkin,
28 Vet. App. 382 (2017) 11, 12, 13

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 28

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 26

Coffy v. Republic Steel Corp.,
447 U.S. 191 (1980) 24

Cook v. Snyder,
28 Vet. App. 330 (2017), *aff'd sub nom. Cook v. Wilkie*, 908 F.3d 813 (Fed. Cir. 2018) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Correia v. McDonald,
28 Vet. App. 158 (2016) 18, 19

Davis v. Shinseki,
No. 12-2013, 2013 WL 6622931 (Vet. App. Dec. 17, 2013) 18

Disabled American Veterans v. Gober,
234 F.3d 682 (Fed. Cir. 2000) 17

Disabled American Veterans v. Secretary of Veterans Affairs,
327 F.3d 1339 (Fed. Cir. 2003) 17

Epic Systems Corp. v. Lewis,
138 S. Ct. 1612 (2018) 28

Ervin v. Shinseki,
24 Vet. App. 318 (2011), *opinion corrected*, 25 Vet. App. 178 (2012) 16

Finley v. United States,
490 U.S. 545 (1989) 25

Fishgold v. Sullivan Drydock & Repair Corp.,
328 U.S. 275 (1946) 23

Franklin v. Shinseki,
No. 12-0369, 2013 WL 1897184 (Vet. App. May 7, 2013) 18

Gray v. McDonald,
27 Vet. App. 313 (2015) 15

Henderson ex rel. Henderson v. Shinseki,
562 U.S. 428 (2011) 7, 24

TABLE OF AUTHORITIES—Continued

Page(s)

Hood v. Brown,
4 Vet. App. 301 (1993), *vacated in part*, 7 Vet. App. 553 (1995) 11

Hudgens v. McDonald,
823 F.3d 630 (Fed. Cir. 2016) 20

Johnson v. McDonald,
762 F.3d 1362 (Fed. Cir. 2014) 14

Johnson v. Shinseki,
26 Vet. App. 237 (2013) 14

Johnson v. Wilkie,
30 Vet. App. 245 (2018) 10, 11

King v. Shinseki,
26 Vet. App. 484 (2014) 16

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 23, 24

Lawrence v. Shaw,
300 U.S. 245 (1937) 23

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 5, 22

Mathis v. Shulkin,
137 S. Ct. 1994 (2017) 16

National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs,
260 F.3d 1365 (Fed. Cir. 2001) 17

Ortiz-Valles v. McDonald,
28 Vet. App. 65 (2016) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Paralyzed Veterans of America v. Secretary of Veterans Affairs, 345 F.3d 1334 (Fed. Cir. 2003) 17

Pereira v. Sessions, 138 S. Ct. 2105 (2018) 27

Pierce v. Underwood, 487 U.S. 552 (1988) 22

Procopio v. Wilkie, No. 17-1821, 2019 WL 347202 (Fed. Cir. Jan. 29, 2019) 17, 28

Rango v. Shinseki, No. 06-2723, 2009 WL 174365 (Vet. App. Jan. 26, 2009) 18

SAS Institute, Inc. v. Iancu, 138 S. Ct. 1348 (2018) 28

Southall-Norman v. McDonald, 28 Vet. App. 346 (2016) 19, 20

Turner v. Shulkin, 29 Vet. App. 207 (2018) 15, 16

United States v. Oregon, 366 U.S. 643 (1961) 24

Wilson v. Shinseki, No. 12-3246, 2014 WL 646208 (Vet. App. Feb. 20, 2014) 18

Womack v. Shinseki, No. 11-0458, 2013 WL 351405 (Vet. App. Jan. 30, 2013) 18

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND REGULATIONS

5 U.S.C. § 706 6

28 U.S.C. § 2412(d)(1)(A) 22

36 U.S.C. §§ 50301-50309 2

36 U.S.C. §§ 170101-170111 3

38 U.S.C. § 5103A 24

38 U.S.C. § 5107(b) 9, 24

38 C.F.R. § 0.600 ..... 9, 26

38 C.F.R. § 3.156(b) 15

38 C.F.R. § 3.321(b)(1) (2012) 14

38 C.F.R. § 4.59 18

38 C.F.R. § 4.71a 20

80 Fed. Reg. 42,040 (July 16, 2015) 20

OTHER AUTHORITIES

Lewis Carroll, *Through The Looking Glass* (1865) 11

Brett M. Kavanaugh, Book Review, 129 Harv. L. Rev. 2118 (2016) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315 (2017) 27

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 8

Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* (7th ed. Westlaw Nov. 2018 update) 23, 28

U.S. Court of Appeals for Veterans Claims, *Annual Report: October 1, 2014 to September 30, 2015 (Fiscal Year 2015)* (2015), http://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf 22

U.S. Court of Appeals for Veterans Claims, *Annual Report: October 1, 2015 to September 30, 2016 (Fiscal Year 2016)* (2016), http://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf 22

U.S. Court of Appeals for Veterans Claims, *Annual Report: October 1, 2016 to September 30, 2017 (Fiscal Year 2017)* (2017), http://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf 21, 22

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Dep't of Veterans Affairs, *About VA: Mission Statement*, https://www.va.gov/ABOUT_VA/index.asp (last updated Mar. 22, 2018) 25

U.S. Dep't of Veterans Affairs, Board of Veterans' Appeals, *Annual Report: Fiscal Year (FY) 2018* (2018), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2018AR.pdf 9

U.S. Office of Pers. Mgmt., *Employment Statistics: June 2018*, https://www.fedscope.opm.gov/employment.asp 9

INTEREST OF *AMICI CURIAE*[1]

Amici are several of the Nation's leading veteran-advocacy organizations. Each *amicus* has extensive experience in dealing with the Department of Veterans Affairs (VA), both in administrative proceedings and before the federal courts. This case is of interest to *amici* because its resolution will have a significant effect on their work. Given their collective wealth of experience with VA, *amici* are well-positioned to explain how *Auer* leads to agency abuses that undermine *Auer*'s own premises. And *amici* have a strong interest in ensuring that the pro-veteran canon of construction remains an important feature of statutory and regulatory interpretation.

The National Organization of Veterans' Advocates, Inc. (NOVA), is a not-for-profit educational membership organization, comprised of attorneys and other qualified members who represent our Nation's veterans and their families before VA and federal courts. NOVA works to develop high standards of service and representation for all persons seeking veterans' benefits.

The American Legion is a federally chartered veteran service organization representing nearly two million members in approximately 13,000 American Legion posts throughout the United States, its territories, and more than 20 foreign countries,

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than *amici curiae* and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

including England, Australia, France, Japan, Mexico and the Philippines. Since its inception in 1919, The American Legion has maintained a strong ongoing concern and commitment to veterans and their families. The American Legion helps veterans survive economic hardship, secure government benefits, and transition from military to civilian life. The American Legion drafted and obtained passage of the first G. I. Bill and has worked tirelessly for the improved subsequent versions. Additionally, The American Legion sponsors job fairs and small business summits all over the country.

American Veterans (AMVETS) is one of the largest congressionally chartered veteran service organizations and has members from each branch of the military, including the National Guard, Reserves, and Merchant Marine. AMVETS provides support for active military and all veterans in procuring their earned entitlements.

Disabled American Veterans (DAV) is a federally chartered veteran service organization, founded to serve the interests of this Nation's disabled veterans. 36 U.S.C. §§ 50301-50309. DAV has over a million members, all of whom are service-connected disabled veterans. Although DAV operates a number of charitable programs that serve the interests of its constituency, its marquee program, and the one for which it is best known, is the "National Service Program." Through that program, and from approximately one hundred locations around the United States and Puerto Rico, DAV assists veterans with their claims for benefits from VA. DAV holds power-of-attorney to represent over one million veterans before VA.

The Military Officers Association of America (MOAA) is an independent, non-profit, non-partisan organization with over 390,000 members from every branch of service—including active duty, National Guard, Reserve, retired, and former officers, as well as their families. Founded in 1929, MOAA actively advocates for compensation and benefit matters for all members of the military community.

The National Association of County Veterans Service Officers (NACVSO) is a national veteran service organization officially recognized by VA for the purpose of preparation, presentation, and prosecution of claims for benefits under laws administered by VA and the training of service officers to achieve those goals. NACVSO pursues benefits for veterans and eligible family members through education, training, and advocacy programs. These services are provided with pro bono legal representation before the agency and the Board of Veterans' Appeals. A growing organization, NACVSO has over 1,800 members in 36 states who promote the common interests of over 8 million veterans, and provides a voice on issues of national importance on veterans' benefits, including the preservation of a fair, consistent, and pro-claimant system of adjudicating claims and appeals. VA's interpretation of its regulations in a veteran-friendly manner is a matter of the utmost importance to NACVSO.

Paralyzed Veterans of America is a national, non-profit veteran service organization founded in 1946 and chartered by the Congress of the United States. *See* 36 U.S.C. §§ 170101-170111. The organization has approximately 17,000 members, each of whom is a veteran of the United States Armed Forces who lives with an injury, disease, or other dysfunction of the

spinal cord. Paralyzed Veterans of America's mission includes public education concerning the difficulties and needs of those with spinal-cord injury and dysfunction; promoting medical research and education related to injuries and diseases of the spinal cord; and legislative and legal advocacy on behalf of its members. To fulfill its mission, Paralyzed Veterans of America provides a wide array of programs and services to its members and veterans of any era, regardless of the nature of their disabilities, as well as to their families and caregivers. These include assistance and representation without charge in their pursuit of benefits and healthcare administered by VA and other federal agencies, as well as pro bono legal representation before the federal courts. Further, as an organization concerned with the civil rights of all persons with disabilities, Paralyzed Veterans of America advocates before Congress and the courts to enhance the quality of life of its members and all Americans with disabilities.

Veterans of Foreign Wars of the United States (VFW) is the Nation's oldest and largest combat veterans' organization, advocating on behalf of all veterans, and, with its Auxiliary, is comprised of nearly 1.7 million members and 2,037 skilled VA-accredited VFW representatives. The VFW's assistance extends from providing financial, social, and emotional support to members of the United States Armed Forces, veterans, and their dependents, to being leaders in the local community, and to having a direct impact on national policy.

Vietnam Veterans of America (VVA) is the only national Vietnam veterans' organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. VVA

assists veterans and their families, both members and non-members, in the prosecution of claims for benefits by providing them with pro bono legal representation before VA and the Board of Veterans' Appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our Constitution vests "[t]he judicial power of the United States" in the Article III federal courts—and, with it, the duty "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). The Administrative Procedure Act (APA) likewise instructs federal courts to "decide all relevant questions of law," including by "determin[ing] the meaning . . . of the terms of an agency action." 5 U.S.C. § 706. The question in this case is whether—despite these clear allocations of interpretive responsibility—this Court should nonetheless give agencies the power to conclusively interpret their own ambiguous regulations.

The answer to that question is no. Forcing courts to defer to agency interpretations that the courts themselves find reasonable but *wrong* is bad law and worse policy. It violates fundamental separation-of-powers principles reflected in the Constitution and the APA, and it creates powerful incentives for bureaucrats (well-meaning or otherwise) to place their own concerns above fidelity to the rule of law. Petitioner is therefore absolutely right: *Seminole Rock* and *Auer* should be overruled.

The undersigned *amici* have decades of experience assisting our Nation's veterans in litigation before and against VA, the agency whose flawed interpretation of its own regulations gave rise to this case. We submit this *amicus* brief because our experience sheds considerable light on whether *Auer* deference makes sense. We offer two points to inform the Court's consideration of this case.

First, we highlight VA's poor track record interpreting its own statutes and regulations. A fundamental assumption of *Auer* deference is that agencies are best positioned to interpret their own regulations in a fair and predictable manner. Time and again, VA has proven that assumption wrong. The agency continually advances interpretations that violate the text and history of the relevant provisions, that exploit vagueness in VA's regulatory enactments, that are inconsistent with VA's own prior pronouncements—and that harm the veterans VA is duty-bound to protect. Indeed, our experience with VA suggests that the *Auer* doctrine makes agency rules *more* difficult to interpret and *more* difficult to predict, because the agency has less incentive to make things clear at the outset. And even when a regulatory ambiguity is genuine and unintentional, VA shows how agencies will often push the envelope and put their own interests above a faithful and impartial construction of the regulatory text. Our experience confirms that *Auer* is misguided and unworkable—and should be overruled.

Second, we ask the Court to use this case to give courts and agencies clear guidance on how they should go about interpreting regulations. Whatever the Court does with *Auer*, it should confirm that courts and agencies must interpret regulations using *all* traditional tools of construction—including not only an analysis of a regulation's text, structure, and history, but also relevant substantive and semantic canons. Most importantly for veterans, the Court should clarify that the pro-veteran canon of construction—a canon that this Court has consistently recognized for more than 75 years—fully applies to VA regulations. *See, e.g.*, *Henderson ex rel.*

Henderson v. Shinseki, 562 U.S. 428 (2011); *Boone v. Lightner*, 319 U.S. 561 (1943). Confirming the salience of that canon will help ensure that courts and VA interpret those regulations to fulfill their core purpose: to protect the men and women who have risked their lives to protect us.

ARGUMENT

I. VA'S TRACK RECORD ILLUSTRATES THE PROBLEMS WITH *AUER* DEFERENCE

The most prominent scholarly critic of *Auer* and *Seminole Rock* has explained that a key problem with those cases is that "[i]f an agency's rules mean whatever it says they mean (unless the reading is plainly erroneous), the agency" can "supply the meaning of regulatory gaps or ambiguities of its own making and [is] relieve[d] . . . of the cost of imprecision that it has produced." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). "This state of affairs makes it that much less likely that an agency will give clear notice of its policies either to those who participate in the rulemaking process prescribed by the Administrative Procedure Act (APA) or to the regulated public." *Id.* A closely related problem is that agencies will exploit *Auer* deference to adopt interpretations that agencies themselves know are reasonable but *wrong*—a practice deeply offensive to the rule of law.

VA is the real-world embodiment of these concerns. In theory, VA should have every incentive in the world to issue clear, predictable regulations governing the availability of benefits to veterans. After all, the overwhelming majority of veterans who

try to secure benefits from the agency do so without an attorney, which makes easy-to-navigate rules and procedures all the more important.[2] Moreover, VA has expressly (and repeatedly) declared its "commitment to provid[ing] the best service possible to veterans," 38 C.F.R. § 0.600, and it operates under a unique statutory obligation to "give the benefit of the doubt to the claimant" when adjudicating claims, 38 U.S.C. § 5107(b).

VA thus has as much incentive as *any* agency to provide clear, unambiguous guidance accessible to your average citizen. But knowing that *Auer* ensures deference so long as its regulations remain ambiguous, the agency all too often promulgates vague, unhelpful rules that it can then interpret—and re-interpret—as it sees fit in each individual case. And VA's interpretations are themselves often incompatible with the text, history, and purpose of its regulations.

The examples described below provide compelling evidence of the pernicious, pervasive effects *Auer* has had on one of the federal government's largest agencies. *See generally* U.S. Office of Pers. Mgmt., *Employment Statistics: June 2018*, https://www.fedscope.opm.gov/employment.asp. They also confirm that *Auer* is unworkable in practice. Put simply, VA is the poster child for why *Auer* is a misguided doctrine that should be overruled.

---

[2] *See* U.S. Dep't of Veterans Affairs, Board of Veterans' Appeals, *Annual Report: Fiscal Year (FY) 2018* at 31 (2018), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2018AR.pdf.

A. VA Undermines The Rule Of Law When Promulgating And Interpreting Its Own Regulations

VA regularly advances interpretations that are intentionally vague, wildly unreasonable, or inconsistent with its past positions—all the while demanding that courts defer under *Auer*. The discussion below highlights cases in which VA's interpretations were so beyond the pale as to flunk even under *Auer*. Those cases illustrate the systemic effects that *Auer*'s deference regime has had on agency rulemaking and interpretation.

1. VA Is Purposely Vague

The recent decision in *Johnson v. Wilkie*, demonstrates VA's preference for vague regulatory standards that VA can interpret however it sees fit in individual cases. 30 Vet. App. 245 (2018). There, VA tried to argue that it could deny a veteran a disability rating without even disclosing the standard under which it was operating. *Id.* at 255. VA's Board of Veterans' Appeals had denied the veteran a 50% disability rating because it found that his migraines—which struck two to three times per month—were not "very frequent," as required by the relevant VA regulation. *Id.* at 248-49. But, in making that finding, the Board did not explain how frequently the veteran's migraines had to strike before qualifying as "very frequent." Nor did any VA regulation define "very frequent."

That vagueness suited VA just fine. On appeal before the U.S. Court of Appeals for Veterans Claims (Veterans Court), VA argued that "the Board may determine whether the 'very frequent' requirement is met without disclosing what benchmark it employed

to reach that conclusion." *Id.* at 255. The court rejected that position. It found it "unacceptable . . . to be placed in the position of accepting the Board's determination that Mr. Johnson's headaches do not meet the [regulatory] requirements" on VA's ground of "'because I say so.'" *Id.* (citation omitted). Judge Allen concurred separately to "underscore [the] disturbing agency practice" illustrated by the appeal, noting that VA's conduct "undermine[d] the very system of judicial review Congress created in the [Veterans' Judicial Review Act] to protect veterans' rights." *Id.* at 255-56.

Johnson is not an outlier. In *Hood v. Brown*, the Veterans Court asked VA to explain what counts as a "[*d*]*efinite* impairment of social and industrial adaptability" under 38 C.F.R. § 4.132 (1992). 4 Vet. App. 301, 303 (1993), *vacated in part*, 7 Vet. App. 553 (1995). VA responded by noting the absence of any agency directive and indicating that a "definite" impairment refers to something between a "mild" impairment and "considerable" impairment. *Id.*

The Veterans Court rejected VA's impossibly vague "*ipse dixit* that 'definite' describes an unarticulated degree of impairment lying somewhere between 'mild' and 'considerable.'" *Id.* The court described VA's approach as "the equivalent of 'because I say so,'" likening it to Humpty Dumpty's famous assertion that "'When I use a word, it means just what I choose it to mean—neither more nor less.'" *Id.* (quoting Lewis Carroll, *Through The Looking Glass* (1865)).

An even more egregious example is *Cantrell v. Shulkin*, 28 Vet. App. 382 (2017), in which the Veterans Court asked VA to file a supplemental brief explaining how it defined the phrases "marginal

employment" and "employment in a protected environment" in 38 C.F.R. § 4.16(a). *Cantrell* Order 1-2 (Dec. 1, 2016), https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom?servlet=ShowDoc/01204188476. Section 4.16(a) generally provides that such employment may not be considered in assigning a veteran's total disability rating. VA's response was blunt: It refused to provide any definition whatsoever. *See Cantrell* Appellee's Resp. to the Court's Dec. 1, 2016 Order 1-2 (Dec. 16, 2016) https://efiling.uscourts.cavc.gov/cmecf/servlet/TransportRoom?servlet=ShowDoc/01204210778 (*Cantrell* Appellee's Resp.). Instead, VA argued that the regulation authorized VA to "define[]" the key terms "on a *facts-found* basis" in each particular case. *Id.* at 1 (emphasis added). VA doubled down on its standardless approach to the regulation at oral argument, where it "steadfastly maintained" that "there is no defining feature or factor . . . that guides [VA's] case-specific assessment." *Cantrell*, 28 Vet. App. at 391.

Remarkably, VA went on to explain that it had "*purposely* used *abstract* language in the regulation to allow for flexibility" in how the agency applied the regulation in different circumstances. *Cantrell* Appellee's Resp. 1 (emphasis added).

> When read as [a] whole, the plain language of the regulation therefore reflects the *Secretary's intent to be abstract in identifying when marginal employment may exist* when earned annual income exceeds the poverty threshold, *providing discretion to the Agency's adjudicators.*

Id. at 5 (emphasis added); *see also id.* at 11. Indeed, VA unabashedly trumpeted its right to be ambiguous and preserve maximum, unconstrained discretion for itself: "VA does not err when it uses abstract or even vague language in its regulations." *Id.* at 6. And of course, VA also argued that the Veterans Court should defer to the agency's position that the regulation empowered VA to decide what the regulatory terms meant on a case-by-case basis, unguided by any overarching rule or principle. *Id.* at 2, 7-8.

Thankfully, the Veterans Court in *Cantrell* saw VA's sophistry for what it was—a naked power grab. The court recognized that "[e]ssentially, the Secretary is asking the Court to defer to a 'we know it when we see it' definition." *Cantrell*, 28 Vet. App. at 390. But "absent an articulated standard . . . that is capable of consistent application," the court rightly concluded that VA's approach would lead to inconsistent and arbitrary results. *Id.* at 390-91. The court rejected VA's argument that "ambiguity by design is a beneficial feature" of Section 4.16, and it refused to defer. *Id.* at 390.

The Veterans Court ultimately got it right in *Cantrell*, but that should not obscure the fundamental problem the case illuminates: VA's response to the incentives created by *Auer* deference was *not* to faithfully and responsibly articulate clear legal standards. Rather, it was to purposely obfuscate and ambiguate—and thereby to retain, for itself, the right to say "what the law is" in each particular case. *Cantrell* is Professor Manning's nightmare scenario come to life.

2. VA Interpretations Are Unreasonable

Even when VA does advance interpretations, they are often blatantly results-oriented rather than genuine attempts to explain the meaning of the regulation at issue. VA's track record undermines any assumption that agencies should be trusted as fair and impartial arbiters of the law.

In *Johnson v. McDonald*, for example, VA had promulgated a regulation allowing veterans to ask the agency to consider criteria not captured in the ordinary schedule of disability ratings when assessing the veteran's specific case. 762 F.3d 1362, 1363 (Fed. Cir. 2014). The regulation provided that such "extra-schedular" consideration would be available where the ordinary disability schedule did not accurately capture the effect of the veteran's "disability *or* disabilities." 38 C.F.R. § 3.321(b)(1) (2012) (emphasis added). When interpreting that regulation, though, VA decided that "disability or disabilities" really meant just "disability," which allowed it to refuse to consider the combined effect of multiple disabilities. *See Johnson*, 762 F.3d at 1365.

Applying *Auer* deference, the Veterans Court concluded that it was required to defer to the agency's interpretation, even though the court itself believed that VA's interpretation hung "on the thinnest thread" and the contrary interpretation "appears clear on its face and favors the veteran." *Johnson v. Shinseki*, 26 Vet. App. 237, 251 (2013). Thankfully, the Federal Circuit subsequently overturned that decision, castigating VA for "manufactur[ing] an ambiguity in language where none exists in order to redefine the plain language of a regulation." *Johnson*, 762 F.3d at 1366.

VA's approach in *Gray v. McDonald* was similarly wrongheaded. 27 Vet. App. 313 (2015). That case involved VA's interpretation of a regulation about where a Vietnam veteran had to serve to claim a statutory presumption of herbicide exposure for purposes of establishing his right to disability benefits. *Id.* at 322. In seeking deference, VA argued that the interpretation reflected its consideration of evidence of herbicide spraying in particular areas of Vietnam. *Id.* at 324.

But when the Veterans Court actually peeked under the hood to see whether any facts supported the agency's position, it concluded that "the documents the [VA] relie[d] upon [we]re devoid of any indication that VA made a fact-based assessment of the probability of exposure in Da Nang Harbor [where Mr. Gray served] from aerial spraying." *Id.* Indeed, the court could not "discern any rhyme or reason in VA's determination" about which harbors qualified for the presumption. *Id.* The court criticized VA's interpretation as "arbitrary," "irrational," "aimless and adrift," and "inconsistent with the identified purpose of the statute and regulation." *Id.* at 322-25. It stated that VA's approach was "just as arbitrary" as "flipping a coin." *Id.* at 325.

Turner v. Shulkin provides another example. 29 Vet. App. 207 (2018). That case involved 38 C.F.R. § 3.156(b), which states that if new and material evidence is "received" before a veteran's administrative-appeal window expires, the evidence will be considered as though it was filed with the original claim. VA argued that when *VA* doctors treat a veteran and create *VA* treatment records—and when a veteran seeking disability benefits specifically identifies those records and that they are in *VA*'s

possession—VA has not actually "received" the records for purposes of Section 3.156(b). *Id.* at 212, 220. The Veterans Court rightly rejected VA's approach. For one thing, the Court explained that VA's interpretation contradicted a formal and binding opinion issued by VA's own General Counsel. *Id.* at 215-16. It also criticized the substance of VA's position as "confused at best," "certainly not well-reasoned," and contrary to "basic fairness" and "common sense." *Id.* at 216-17.

Johnson, *Gray*, and *Turner* are just representative samples of the post-hoc justifications that VA regularly tries to advance under *Auer*. This case of course presents an additional illustration. *See* Pet. Br. 55-61. But many, many other examples abound.[3] Nor is VA's track record of unreasonable interpretations—coupled with assertive demands for deference—limited to regulations. Indeed, VA's scorecard looks even worse when *Chevron* cases are

---

[3] *See, e.g.*, *Ortiz-Valles v. McDonald*, 28 Vet. App. 65, 71 (2016) ("The Secretary cannot simply add restrictions to a regulation where they do not exist."); *King v. Shinseki*, 26 Vet. App. 484, 491 (2014) (holding that VA's interpretation was foreclosed by regulation's plain language because it would render entire subsection superfluous); *Bates v. Shinseki*, No. 08-1453, 2012 WL 1971327, at *6 (Vet. App. June 4, 2012) (rejecting VA's interpretation because "[t]he Secretary has provided no explanation for his position," "has cited no authority . . . to support this position," and "has not distinguished his litigation position from a mere post hoc rationalization"); *Ervin v. Shinseki*, 24 Vet. App. 318, 326-27 (2011) (rejecting VA's interpretation because VA "may not attempt to subvert the plain language of the regulation simply by adopting a litigating position contrary to it" and "Secretary fail[ed] to distinguish his litigation position from a mere post hoc rationalization"), *opinion corrected*, 25 Vet. App. 178 (2012).

factored into the mix.[4] It seems to be standard operating procedure for VA to develop regulatory frameworks that have "no basis in the relevant statutes" and do "nothing to assist, and much to impair, the interests of those the law says [VA] is supposed to serve." *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from denial of certiorari).

---

[4] *See, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (rejecting deference to VA interpretation that "flies against the plain language of the statutory text"); *Procopio v. Wilkie*, No. 17-1821, 2019 WL 347202, at *4-5 (Fed. Cir. Jan. 29, 2019) (holding that "[n]o fair reading" could support VA's interpretation, notwithstanding agency's "primary argument . . . that *it* injected ambiguity" into statutory term); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1338, 1346 (Fed. Cir. 2003) (VA promulgated "unreasonable" regulation that was "contrary to the statutory mandate" because it "impose[d] on claimants an arbitrary new deadline" that narrowed veterans' ability to submit evidence); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1348-49 (Fed. Cir. 2003) (VA "impose[d] a misleading hurdle" by promulgating regulation providing that claimants had "not less than 30 days to respond to notice," despite statute providing that claimants had "one year from the date of such notification" to respond (citations omitted)); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1368 (Fed. Cir. 2001) (VA "failed to explain its rationale for interpreting . . . virtually identical statutes in conflicting ways"); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 699 (Fed. Cir. 2000) (VA imposed heightened pleading requirements on veterans that were "contrary to" the relevant statute); *Cook v. Snyder*, 28 Vet. App. 330, 339-40 (2017) (rejecting VA argument that its regulation reasonably construed a statutory provision despite the regulation *pre-dating* that statutory provision), *aff'd sub nom. Cook v. Wilkie*, 908 F.3d 813, 818-19 (Fed. Cir. 2018) (in which VA argued that a post-remand review of a claim by the Board of Veterans' Appeals is not an "appeal"—despite the Board having jurisdiction over only appeals).

3. VA Interpretations Are Inconsistent

Even when VA correctly identifies multiple interpretations of a regulation that might be plausible, it has a penchant for switching between those interpretations from case to case without rhyme or reason. VA's inconstancy further undermines the case for deference.

In *Correia v. McDonald*, the Veterans Court addressed 38 C.F.R. § 4.59, a regulation specifying how VA medical examiners should examine veterans who suffer from disabilities involving painful physical motion. 28 Vet. App. 158, 163-70 (2016). For years, VA had interpreted Section 4.59 as providing a mandatory standard for painful-motion examinations and had conceded that remand was appropriate if a veteran's examination did not comply with the regulation. *See, e.g.*, *Davis v. Shinseki*, No. 12-2013, 2013 WL 6622931, at *4 (Vet. App. Dec. 17, 2013).[5]

But then VA suddenly and completely switched gears: It took the new position that Section 4.59's language was merely permissive, and that the regulation just gave some relevant factors that medical examiners might choose to consider when testing for painful motion—such that the failure to comply with the regulation's requirements in that case was *not* a basis for remand. The Veterans Court recognized that this interpretation was not

---

[5] *See also Bartlett v. McDonald*, No. 13-1867, 2014 WL 4748597, at *2 (Vet. App. Sept. 24, 2014); *Wilson v. Shinseki*, No. 12-3246, 2014 WL 646208, at *3 (Vet. App. Feb. 20, 2014); *Franklin v. Shinseki*, No. 12-0369, 2013 WL 1897184, at *3 (Vet. App. May 7, 2013); *Womack v. Shinseki*, No. 11-0458, 2013 WL 351405, at *5-6 (Vet. App. Jan. 30, 2013); *Rango v. Shinseki*, No. 06-2723, 2009 WL 174365, at *2 (Vet. App. Jan. 26, 2009).

necessarily inconsistent with the regulation's text, which it found ambiguous. *See Correia*, 28 Vet. App. at 166. But the court nonetheless refused to defer, because the agency's failure to explain the basis for its interpretive turnabout—or even to *acknowledge* the change—made it impossible to tell what the agency's true, official interpretation of the regulation would be. *See id.* at 167-68.

In *Southall-Norman v. McDonald*, VA similarly tried to re-interpret its regulation while expecting deference. 28 Vet. App. 346 (2016). *Southall-Norman* involved the same regulation as *Correia*, but the issue was whether Section 4.59 applied to all medical evaluations involving painful physical motion or only to evaluations for diagnostic codes that specifically reference a limitation of motion. *Id.* at 348. VA regulations break disabilities down into so-called diagnostic codes; each code represents a disability and defines the criteria and symptoms required for that diagnostic code to apply. VA argued that Section 4.59 applies only when evaluating diagnostic codes that specify a limitation of motion or involve range-of-motion measurements. And VA further argued that the court should defer to VA's interpretation if it thought Section 4.59 was ambiguous on this point.

The Veterans Court rejected both arguments. It held that Section 4.59's plain terms foreclosed VA's interpretation, and it "reject[ed] the Secretary's attempts to read into the regulation a limitation to its applicability that is simply not there." *Id.* at 352. Even if Section 4.59 were ambiguous on this point, the court "still would not defer to the Secretary's proffered interpretation, because it does not reflect the agency's considered view on the matter, as he has not consistently adhered to that interpretation." *Id.* VA

had advanced, in at least three other recent cases, a position "directly contrary to" its position in *Southhall-Norman*. *Id.* at 352-53.

A final example of VA's interpretive indecision is *Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016). There, VA argued that *partial* knee-joint replacements do not qualify as knee-joint replacements under the relevant VA diagnostic code, 38 C.F.R. § 4.71a. *Hudgens*, 823 F.3d at 631-32. But that was not how VA had treated partial knee-joint replacements in the past. The court rejected VA's request that it apply *Auer* deference and "disregard the numerous inconsistent rulings" in prior adjudications. *Id.* at 638.

Hudgens is also a striking example of VA's chutzpah in invoking *Auer*. Twelve days before VA's brief in that case was due, the agency published a final informal rule to "clarify" the relevant language in Section 4.71a. *Id.* at 634 (explaining this chronology and citing *Agency Interpretation of Prosthetic Replacement of a Joint*, 80 Fed. Reg. 42,040 (July 16, 2015)). But despite seeing the need to issue this clarification, VA's brief told the court that the regulation's language was "*clear on its face*." *Hudgens* Br. of Resp't-Appellee 23, 2015 WL 4615960 (Fed. Cir. July 28, 2015) (emphasis added). As the Veterans Court explained, this chain of events made it "difficult to avoid the conclusion that the regulation is sufficiently ambiguous to lead to conflicting rulings and that [the] current agency interpretation [of Section 4.71a] was conveniently adopted to support the Veterans Court's interpretation in this case." *Hudgens*, 823 F.3d at 639. The court rightly rejected VA's "*post hoc* rationalization" and refused to defer under *Auer*. *Id.* (citation omitted).

* * *

Any one of the cases discussed above, by itself, might not be all that telling. But taken together as a whole, they speak volumes—not just about VA, but also about the premises underlying *Auer*. These examples show that *Auer* is misguided in treating agencies as good-faith interpreters, simply unpacking and explaining what they had already meant and said in their substantive regulations. As noted, VA regularly abuses the leeway it gets under *Auer* by intentionally refusing to provide clarity; advancing opportunistic "interpretations" that are really just attempts to re-write substantive rules without the bother of notice and comment; and bouncing between positions on an arbitrary and unpredictable case-by-case basis. We suspect VA is not the only federal agency to engage in these dubious practices.

B. Hard Data Corroborates VA's Unreasonableness

Lest *amici* be accused of cherry-picking anecdotal examples above, we note that hard data confirms VA's unreasonable litigating positions. When claims actually make it out of VA's administrative maze on appeal, the agency loses—a lot. In 2017, of the 3,619 appeals to the Veterans Court that resulted in a merits disposition, only 499—13.8%—were resolved completely in VA's favor. U.S. Court of Appeals for Veterans Claims, *Annual Report: October 1, 2016 to September 30, 2017 (Fiscal Year 2017)* at 2 (2017), http://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf.

Of course, a party can lose by simply being wrong—without being unreasonable. But we know that VA *is* unreasonable in these cases from another

statistic: Of all the applications for fees and expenses under the Equal Access to Justice Act (EAJA) that the Veterans Court decided in 2017, a staggering 99.6%—2,884 out of 2,896—were granted. *Id.* This means VA did not just take an erroneous position in the cases underlying those 2,884 applications—it means VA took a position that the court deemed to be "substantially [un]justified"—which is to say, incapable of "satisy[ing] a reasonable person." 28 U.S.C. § 2412(d)(1)(A); *Pierce v. Underwood*, 487 U.S. 552, 563, 565-66 & n.2 (1988).

And 2017 was no aberration. VA did even worse in 2016. Of the 3,717 Veterans Court merits dispositions in 2016, only 457 (12.3%) were complete affirmances. U.S. Court of Appeals for Veterans Claims, *Annual Report: October 1, 2015 to September 30, 2016 (Fiscal Year 2016)* at 2 (2016), http://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf. Granted, VA did incrementally better on EAJA applications in 2016: 2,835 out of 2,855 were granted (only 99.3%). And in 2015? On the merits, 445 complete affirmances out of 3,522 (12.6%). U.S. Court of Appeals for Veterans Claims, *Annual Report: October 1, 2014 to September 30, 2015 (Fiscal Year 2015)* at 2 (2015), http://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf. On EAJA applications, 2,874 out of 2,910 were granted (98.8%). *Id.* at 3.

The cases and data discussed above are egregious, but they accurately reflect VA's penchant for unreasonable litigating positions. Quite simply, VA has proven unable to impartially "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). VA's track record confirms that *Auer* deference leads to opportunistic behavior and

harmful results, and that it is not a workable doctrine of interpretation. This Court should now reclaim the judiciary's constitutional and statutory authority to interpret the law.

II. THE PRO-VETERAN CANON IS A VALID TOOL OF REGULATORY INTERPRETATION

This case is almost certainly destined to become the leading precedent on the proper interpretation of federal agency regulations. It is therefore important that the Court provide guidance to lower courts and agencies on how they should decide what those regulations mean. Regardless of what the Court says about *Auer*, it should make clear that substantive canons of construction—*including the pro-veteran canon*—are valid and appropriate tools of regulatory construction.

A. The Pro-Veteran Canon Has Deep Roots In American Law And Properly Informs The Interpretation Of Regulations

During World War II, this Court instructed that a statute providing benefits to veterans "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 278, 285 (1946) (holding that Selective Training and Service Act of 1940 must be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Lawrence v. Shaw*, 300 U.S. 245, 249-50 (1937) (construing veteran-benefits statute in manner most favorable to veteran); 3 Norman Singer & Shambie

Singer, *Sutherland Statutes and Statutory Construction* § 60:2 n.60 (7th ed. Westlaw Nov. 2018 update) (discussing liberal construction of remedial statutes, including veteran-benefit laws).

This rule of construction—the pro-veteran canon—has retained its force in the 75 years since. *See, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) (noting "rule that interpretive doubt is to be resolved in the veteran's favor); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (noting the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 195-96 (1980). Most recently, this Court applied the canon in *Henderson ex rel. Henderson v. Shinseki* to hold that the 120-day deadline for filing an appeal with the Veterans Court is not jurisdictional but procedural. 562 U.S. 428, 441 (2011).

The pro-veteran canon accounts for Congress's special and longstanding "solicitude" for veterans. That solicitude resonates throughout our Nation's veteran-benefit laws. *See United States v. Oregon*, 366 U.S. 643, 647 (1961). For example, unlike almost every other federal agency that administers a benefits scheme, VA is obliged to help claimants develop their claims. *See* 38 U.S.C. § 5103A. Similarly, the Veterans' Judicial Review Act requires VA to "give the benefit of the doubt to the claimant" when adjudicating a claim. 38 U.S.C. § 5107(b). These provisions reflect Congress's intent to "place a thumb on the scale in the veteran's favor." *Henderson*, 562 U.S. at 440 (citation omitted). The canon works the same way, albeit in the judicial context. It functions as a tie-breaker; if all other interpretive tools leave the meaning of a provision unclear, the canon

provides that "interpretive doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 117-18.

By resolving doubts in the veteran's favor, the canon implements how Congress intends veteran-benefit laws be construed. Indeed, this Court has "presume[d] congressional understanding of" the pro-veteran canon and acknowledged that Congress legislates with this understanding. *King*, 502 U.S. at 220 n.9; *see also Finley v. United States*, 490 U.S. 545, 556 (1989) (noting the "paramount importance" of Congress being able to "legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts"). Congress expects that the courts—and VA—will give veterans the benefit of the doubt when facing close interpretive calls.

All the reasons that animate the pro-veteran canon's application to statutory interpretation apply with even more force to regulatory interpretation. After all, every federal agency is a creation of Congress. Agencies administer Congress's laws, and virtually every (lawful) action an agency can take is pursuant to a congressional delegation of authority. Because the canon is predicated on Congress's special solicitude for veterans, it should apply to Congress's administrative creations—including, most importantly, to VA.

Even putting congressional intent aside, applying the pro-veteran canon to VA's regulations also effectuates *VA's own* stated intent. VA's official mission statement provides that the agency's fundamental purpose is to "fulfill President Lincoln's promise '[t]o care for him who shall have borne the battle, and for his widow, and his orphan." U.S. Dep't of Veterans Affairs, *About VA: Mission Statement*,

https://www.va.gov/ABOUT_VA/index.asp (last updated Mar. 22, 2018). Similarly, VA's own regulations espouse its "commitment to provide the best service possible to veterans." 38 C.F.R. § 0.600. Applying the pro-veteran canon to the interpretation of VA's regulations holds VA to its own words and effectuates the agency's core mission. If a VA regulation is truly ambiguous, the scales *should* tip in favor of veterans.

B. The Pro-Veteran Canon Applies Irrespective Of Whether *Auer* Is Overruled

Whether or not *Auer* deference survives this case, the Court should clarify that the pro-veteran canon is an important tool that applies to the interpretation of VA regulations.

If *Auer* is overruled, the pro-veteran canon should be used like any other substantive canon of construction—as an interpretive tool that helps courts and agencies discern the true meaning of a regulation. Thus, when an ambiguity arises in a veteran-benefit regulation, the canon should place a thumb on the scale in favor of the pro-veteran interpretation. To be sure, that interpretation must give way if other interpretive tools more persuasively require a different result. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) ("Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction."). But the pro-veteran canon should carry significant weight in the balance. And if all other interpretive tools result in a wash, "interpretive doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 117-18.

If *Auer* stays on the books, the pro-veteran canon should be used in largely the same way, albeit when a court is initially deciding whether a regulation is ambiguous and deference is appropriate. That threshold determination—analogous to Step One of the *Chevron* inquiry—is crucially important. As Justice Kennedy explained, courts must avoid abandoning their interpretive role by engaging in only a "cursory analysis" at the threshold before throwing up their hands and giving "reflexive deference" to an agency. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring); *see also* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 Vand. L. Rev. En Banc 315, 324 (2017) (lamenting that "in agency cases it often seems that the court pauses only briefly at [*Chevron*] step one, without much effort to hack through the undergrowth, before proceeding straightaway down the cleared path of step two").

Some laws really are ambiguous. But before deferring to an agency, courts must do the hard interpretive work necessary to determine whether the meaning of a provision is truly in doubt. Given that the pro-veteran canon is a reliable proxy for the original intent of both Congress and VA, courts should apply the canon when assessing ambiguity and deciding whether to defer under *Auer*.

That approach also makes sense in light of this Court's *Chevron* precedent. *Chevron*'s all-important Footnote Nine makes clear that the Step One inquiry involves *all* "traditional tools of statutory construction"—and that if a court applies those tools and "ascertains that Congress had an intention" on the question at issue, "that intention is the law and

must be given effect." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *see, e.g., SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." (quoting *Chevron*, 467 U.S. at 843 n.9)); *see also* Brett M. Kavanaugh, Book Review, 129 Harv. L. Rev. 2118, 2153 n.175 (2016) ("[I]f we took *Chevron* footnote 9 at face value, fewer cases would get to *Chevron* step two in the first place.").

As explained, the pro-veteran canon is undeniably a "traditional tool[] of statutory construction"—and it thus plainly applies at *Chevron* Step One. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1618 (2018) (citation omitted); *id.* at 1630 ("Where, as here, the canons [of construction] supply an answer, '*Chevron* leaves the stage.'" (citation omitted)). There is no reason it should not apply at the analogous stage of any *Auer* inquiry. After all, "[a] regulation is a written instrument and the general rules of interpretation apply. When a regulation is legislative in character, rules of interpretation applicable to statutes should be used to determine its meaning." 1A Singer & Singer, *supra*, § 31:6 (footnote omitted); *see generally Procopio v. Wilkie*, No. 17-1821, 2019 WL 347202, at *9 (Fed. Cir. Jan. 29, 2019) (O'Malley, J., concurring) (explaining that "the pro-veteran canon, like every other canon of statutory construction, can and should apply" at the threshold step of the *Chevron* and *Auer* inquiries).

For the reasons noted above, this Court should conclusively reject *Auer* deference and restore the interpretive authority that rightfully belongs to

Article III courts. But whether it does so or not, the Court should make clear that the pro-veteran canon is a valid tool of regulatory construction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ROMAN MARTINEZ
Counsel of Record
BENJAMIN W. SNYDER
GREGORY B. IN DEN BERKEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Amici Curiae

KEVIN J. BARTLETT
National Judge Advocate
The American Legion
National Headquarters
700 N. Pennsylvania St.
Indianapolis, IN 46206
(317) 630-1200

Counsel for The American Legion

JOHN MUCKELBAUER
General Counsel
VFW National Headquarters
406 W. 34th Street
Kansas City, MO 64111
(816) 968-1140

Counsel for Veterans of Foreign Wars of the United States

CHRISTOPHER J. CLAY
General Counsel
MEGAN B. HALL
Assistant General Counsel
DISABLED AMERICAN VETERANS
3725 Alexandria Pike
Cold Spring, KY 41076
(859) 442-2043

Counsel for Disabled American Veterans

KELSEY YOON
VIETNAM VETERANS OF AMERICA
8719 Colesville Road
Suite 100
Silver Spring, MD 20910
(301) 335-2183

Counsel for Vietnam Veterans of America

LEONARD J. SELFON
General Counsel
LINDA E. BLAUHUT
Deputy General Counsel
PARALYZED VETERANS OF AMERICA
801 18th Street, NW
Washington, DC 20006
(202) 416-7629

Counsel for Paralyzed Veterans of America

January 31, 2019

No. 18-15

IN THE
Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONER

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
FRANK D. GARRISON
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org
Counsel for Amicus

QUESTION PRESENTED

Whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

This Court Should Overrule *Auer* and *Seminole Rock* 4

A. APA notice-and-comment procedures are fundamental for protecting administrative due process 4

B. *Auer* Deference undermines the APA's due process protections by causing instability in the law and promoting excessive agency oscillation 6

C. Overruling *Auer* and *Seminole Rock* is an essential first step for restoring the rule of law to the administrative state 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Auer v. Robbins,
519 U.S. 452 (1997) ..... passim

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.,
467 U.S. 837 (1984) 12

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 6, 7, 8

Commc'ns Workers of Am. v. Beck,
487 U.S. 735 (1988) 1

Dana Corp.,
351 NLRB 434 (2007) 9

FCC v. Fox TV Stations, Inc.,
567 U.S. 239 (2012) 5

Guard Publ'g v. NLRB,
571 F.3d 53 (D.C. Cir. 2009) 9

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (2016) 12

Harris v. Quinn,
__ U.S. __, 134 S. Ct. 2618 (2014) 1

Janus v. State, Cty., & Mun. Emps.,
__ U.S. __, 138 S. Ct. 2448 (2018) 1

Knox v. SEIU, Local1000,
567 U.S. 298 (2012) 1

Lamons Gasket Co.,
357 NLRB 739 (2011) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Mich. v. EPA,
135 S. Ct. 2699 (2015) 12

Miller & Anderson, Inc.,
364 NLRB No. 39 (2016) 10

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 14

NLRB v. Wyman-Gordon Co.,
394 U.S. 759 (1969) 11

Oakwood Care Center,
343 NLRB 659 (2004) 10

Perez v. Mortg. Bankers Ass'n,
__ U.S. __, 135 S. Ct. 1199 (2015) 5, 6

Purple Comm'ns, Inc.,
361 NLRB 1050 (2014) 9

Register Guard,
351 NLRB 1110 (2007) 9

Sandifer v. U.S. Steel Corp.,
678 F.3d 590 (7th Cir. 2012) 8

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 12, 13, 14

Talk Am., Inc. v. Mich. Bell Tel. Co.,
__ U.S. __, 131 S. Ct. 2254 (2011) 7

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 6

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Morton Salt Co.,
338 U. S. 632 (1950) 5

Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,
435 U.S. 519 (1978) 4

STATUTES & RULES

5 U.S.C. § 551, *et. seq* ..... *passim*

5 U.S.C. § 551(4) 14

5 U.S.C. § 551(5) 13

5 U.S.C. § 553 14

SUP. CT. R. 37.3(a) 1

SUP. CT. R. 37.6 1

OTHER AUTHORITIES

Aaron L. Nielson, *Beyond Seminole Rock*,
105 GEO. L.J. 943 (2017) 12, 13

Administrative Procedure Act: Legislative History, S. Doc. No. 298, 79th Cong., 2d Sess. 76 (1946) 4

Andrew M. Kramer, *The Clinton Labor Board: Difficult Times for a Management Representative*,
16 LAB. LAW. 75 (2000) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78 (1962) 9

Board Proposes Rule to Change its Joint-Employer Standard, NATIONAL LABOR RELATIONS BOARD (Sep. 13, 2018), https://www.nlrb.gov/news-outreach/news-story/board-proposes-rule-change-its-joint-employer-standard. 2, 10

Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223 (2013) 7

George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557 (1996) 5

Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411 (2010) 11

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 BOSTON U.L. REV. 189 (2009) 9

Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) 4

Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985) 2, 8, 10

Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) 5

INTEREST OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") has been the nation's leading litigation advocate for employee free choice since 1968. In furtherance of this mission, Foundation staff attorneys have represented individual employees in numerous cases before this Court, lower federal courts, and agencies. *E.g.*, *Janus v. State, Cty., & Mun. Emps.*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).

The Foundation has a particular interest in this case's outcome because it currently represents hundreds of employees across the nation whose free choice to refrain from unionization and collective bargaining largely depends on the National Labor Relations Board's ("NLRB") proper implementation of the National Labor Relations Act ("NLRA"). Over the past several decades, the NLRB has been criticized for not regulating through notice-and-comment rulemaking and for engaging in excessive legal and

---

[1] Pursuant to Supreme Court Rule 37.3(a), both parties received timely notice of *amicus curiae*'s intent to file this brief and consented to its filing. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

policy oscillation.[2] More recently, however, the NLRB has issued proposed rules on major employee rights' issues under the NLRA.[3] Thus, it is important for the NLRA's stability that the proper Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq*, rulemaking procedures—and the benefits that come with those procedures—are not undermined by "*Auer* deference."

SUMMARY OF ARGUMENT

The Court should overrule *Auer*, 519 U.S. 452, and *Seminole Rock*, 325 U.S. 410, as argued in Petitioner's brief. Amicus offers a unique perspective on one of Petitioner's arguments—that *Auer* deference injects intolerable unpredictability into agency action, Pet. Br. 37–43—and provides fuller context to that argument.

A. The APA was a long-fought compromise, producing a statutory scheme that tolerates broad congressional delegations to the administrative state but requires agencies to promulgate rules in a certain way to protect the regulated public. Notice-and-comment rulemaking is one of the chief protections included in that compromise. Notice-and-comment

---

[2] *See, e.g.*, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

[3] *E.g.*, *Board Proposes Rule to Change its Joint-Employer Standard*, National Labor Relations Board (Sep. 13, 2018), https://www.nlrb.gov/news-outreach/news-story/board-proposes-rule-change-its-joint-employer-standard.

rulemaking protects administrative due process rights by providing fair notice and giving the public a chance to participate in agency law-making.

B. But, *Auer* deference undermines APA-granted administrative due process by causing instability in the law and allowing excessive agency legal and policy oscillation. Indeed, *Auer* deference allows an agency to amend a rule without going through notice-and-comment rulemaking and thus lessens the APA's safeguards. *See* Pet. Br. 25–33. It does this by allowing the agency to draft gap-filled rules and then receive judicial deference when it fills in those gaps in the future. *See* Pet. Br. 40.

Often, this will occur after a change in the Executive Branch's leadership. When a new administration comes into power, it appoints its own agency leadership and instills its own regulatory policy. This combination of easily-amended rules and turn-over in executive leadership leads to excessive legal and policy oscillation—abrupt changes in the legal landscape by agency fiat—causing tremendous harm to those regulated by the agency. *See id.*

C. Overruling *Auer* and *Seminole Rock* is important for restoring the rule of law in the administrative state. But that is only a first step. This Court should also revisit other deference doctrines that do not conform to the Constitution or APA.

ARGUMENT

This Court Should Overrule *Auer* and *Seminole Rock*.

A. APA notice-and-comment procedures are fundamental for protecting administrative due process.

Congress passed the APA to protect against the dangers of an unchecked Executive Branch. Indeed, the APA bolsters the Constitution's procedural due process provisions by protecting the regulated public from an overreaching government. It acts as "a bill of rights for the hundreds of thousands [(now millions)] of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government." Administrative Procedure Act: Legislative History, S. Doc. No. 298, 79th Cong., 2d Sess. 76 (1946). In this way, the APA is a "'basic and comprehensive regulation of procedures' . . . , [and] also a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (citation omitted); *see also*, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1248 (1982) (noting the APA was a "working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards").

Specifically, the APA's notice-and-comment rulemaking process is one of the most fundamental protections the people have against an overreaching Executive. *See* George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1653 (1996) (noting the notice-and-comment provision "is the most important change the APA imposes on agency practice"). Notice-and-comment rulemaking does this by providing fair notice and allowing public participation in agency law-making. As this Court has noted, a "fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). And "democratic governance and traditions of due process" demand that the public be "heard before they are subjected to the coercive power of the state." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

Thus the APA is an important check on the administrative state and on "administrators whose zeal might otherwise [carry] them to excesses not contemplated in legislation creating their offices." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (citing *United States v. Morton Salt Co.*, 338 U. S. 632, 644 (1950)) (Scalia, J., concurring).

B. *Auer* Deference undermines the APA's due process protections by causing instability in the law and promoting excessive agency oscillation.

Auer deference undermines the APA's notice-and-comment rulemaking protections in two important ways, both of which affect fair notice. First, *Auer* deference promotes instability in the law. Second, and related, *Auer* deference promotes excessive agency oscillation.

1. *Auer* deference promotes instability in the law by giving agencies free rein to change the law without going through the quasi-legislative process the APA requires. Specifically, *Auer* deference "allows agencies to make binding rules unhampered by notice-and-comment procedures." *Perez*, 135 S. Ct. at 1212. Agencies do this by drafting "vague regulations because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

This instability in the law, in turn, diminishes fair notice. As members of the Court have recognized, *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat[ing] the notice and predictability purposes of rulemaking.'" *Christopher v. SmithKline Beecham*

Corp., 567 U.S. 142, 158–59, (2012) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring)) (alterations in the original, other citations omitted).

An acute example is the Department of Labor's ("DOL") "regulation by amicus" program, which was used in *Auer* itself. Starting in the mid-1990s, the DOL changed its legal position on the Fair Labor Standards Act ("FLSA") several times and received deference, including *Auer* deference, in many cases that allowed it to do so. *See* Deborah Thompson Eisenberg, *Regulation by Amicus: The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1243–50 (2013) (summarizing the DOL's campaign to define the FLSA via interpretations advanced in amicus briefs and the resulting "wild flip-flops in the DOL's position on certain issues during a short period of time"). As this Court noted in *Christopher*, a case dealing with the DOL's attempt to regulate by *amicus*,

> [i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

567 U.S. at 158–59.

2. Deference to such changes in meaning—i.e., changes in the law—not only undermines administrative due process by creating instability in the law, but also causes excessive legal and policy oscillation.[4] This oscillation, in turn, undermines administrative due process, including fair notice. It is a continual agency flip-flopping cycle that leaves the regulated public with spinning heads.

The DOL example above is an apt example of this phenomenon as well. From the Clinton, to Bush, to Obama administrations, those regulated by the FLSA had to defend against ambush tactics by the DOL depending on the political party in power at that given time. Then-Judge Posner summed up the problem with agency oscillation well in a case dealing with the DOL's "gyrating" back and forth FLSA interpretations: "It would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat." *Sandifer v. U.S. Steel Corp.* 678 F.3d 590, 599 (7th Cir. 2012).

---

[4] This term is borrowed from Samuel Estreicher's *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (using the term "policy oscillation" to describe the National Labor Relations Board's dramatic number of rule reversals).

Agency oscillation, however, is not just an *Auer* deference phenomenon. It is also a symptom of agency rulemaking through adjudication. For example, the NLRB has been criticized for engaging in excessive legal and policy oscillation from administration to administration. *See* Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 BOSTON U.L. REV. 189, 229–33 (2009); Andrew M. Kramer, *The Clinton Labor Board: Difficult Times for a Management Representative*, 16 LAB. LAW. 75, 80 (2000); Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78, 78 (1962).

For decades, the NLRB abruptly has changed legal and policy positions on dozens of major rules affecting employees' free choice, including on issues dealing with representation elections, property rights, and bargaining units. *See, e.g.*:

- *Lamons Gasket Co.*, 357 NLRB 739 (2011), overruling *Dana Corp.*, 351 NLRB 434 (2007) (holding the NLRA precluded employees from obtaining a decertification election for at least six months after a card check recognition);
- *Purple Comm'ns, Inc.*, 361 NLRB 1050 (2014), overruling *Register Guard*, 351 NLRB 1110 (2007), *enfd. in relevant part and remanded sub nom. Guard Publ'g v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) (holding that under the NLRA, employers must permit employees to

use the employer's email systems for unionization campaigns because the previous holding focused too much on "property rights"); and

- *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016), overruling *Oakwood Care Center*, 343 NLRB 659 (2004) (holding a petitioned-for bargaining unit appropriate despite unrebutted evidence the bargaining unit had ceased to exist more than three years before the Board issued its decision).[5]

In recent months, the NLRB has proposed rulemakings dealing with key NLRA legal issues.[6] This will be of little value to the regulated public, however, if *Auer* and *Seminole Rock* are still law. If the agency can draft ambiguous final rules so that it can later shift policies without having to go through notice-and-comment rulemaking again, the regulated public—including employees—will be in the same position. It will be as if the NLRB had continued to regulate through adjudication without the public's

---

[5] The NLRB's legal and policy oscillation is not isolated to recent administrations. *See, e.g.*, Estreicher, *Policy Oscillation at the Labor Board*, 37 Admin. L. Rev. 163 (criticizing the NLRB during the Reagan Administration for policy oscillation through adjudication and arguing for rulemaking instead).

[6] *See, e.g., Board Proposes Rule to Change its Joint-Employer Standard*, NATIONAL LABOR RELATIONS BOARD (Sep. 13, 2018), https://www.nlrb.gov/news-outreach/news-story/board-proposes-rule-change-its-joint-employer-standard.

administrative due process protections of the APA's rulemaking (or amendment) requirements.

The NLRB should be lauded for its recent trend of utilizing its quasi-legislative power to make rules instead of ad-hoc quasi-judicial adjudication.[7] But if the agency can ignore the APA and the protections it provides by later amending its rules through interpretation alone, the current shift to rulemaking will be of little value. Indeed, the very same evils that are produced by ad-hoc adjudication will be replicated on the back-end of rulemaking through *Auer* deference. It is thus important this Court overrule *Auer* and *Seminole Rock*.

C. Overruling *Auer* and *Seminole Rock* is an essential first step for restoring the rule of law to the administrative state.

Overruling *Auer* and *Seminole Rock* is important for restoring the rule of law to the administrative state, but it should only be the start. Ignoring the APA and granting deference to administrative agencies in general has caused incalculable damage to the regulated public's individual rights. For example,

---

[7] This Court and legal academy members have chastised the NLRB for decades over not utilizing the APA's notice-and-comment procedures. *See, e.g., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969) (plurality opinion); Jeffery S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411 (2010).

Chevron[8] deference should be reconsidered by the Court in an appropriate case because it infringes on core constitutional rights and violates the APA. *See Mich. v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (2016) (Gorsuch, J., concurring).

There is another area of deference, and one arguably connected to *Auer* deference, that this Court should also revisit. In *SEC v. Chenery Corp.*, a pre-APA case, the Court held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." 332 U.S. 194, 203 (1947). There is an argument that *Auer* deference and the *Chenery* doctrine are substitutes, if imperfect, and that if *Auer* deference is no longer available to agencies, they will revert to utilizing ad-hoc quasi-judicial lawmaking through adjudications instead of using quasi-legislative rulemaking. *See, e.g.*, Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 964–65 (2017) (arguing that overruling *Auer* deference to an agency's regulatory interpretations might lead agencies to utilize their discretion to make law by ad-hoc adjudication, rather than the quasi-legislative notice-and-comment rulemaking).

There is little evidence that agencies currently utilizing notice-and-comment rulemaking would re-

---

[8] *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

gress to ad-hoc adjudication.[9] Nevertheless, if there is merit to the argument that overruling *Auer* and *Seminole Rock* might lead to more ad-hoc adjudication, not overruling *Auer* deference because of possible secondary effects would be like having a hole in your boat and not fixing it because there is a second hole in your boat. Rather, you fix both holes.

Thus, this Court should revisit and overrule, or at least limit, *Chenery*.[10] It should do so for two reasons. First, *Chenery* is, like *Auer* deference, inconsistent with the APA's text. APA Section 551 defines rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A rule, in turn, is defined, in relevant part, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to

---

[9] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 665 (1996) ("Agencies are not institutionally indifferent to the choice between rulemaking and adjudication. Although *Chenery* does give agencies a presumptive legal right to implement their delegations through adjudication, practical or legal concerns may induce them to use rulemaking in particular contexts."); *see also*, *id.* at 666 (noting "the demand for agency rulemaking may reflect external political or legal requirements that have been imposed on the agency. In reaction to growing perceptions of regulatory torpidity and agency capture, reform movements in the 1960s emphasized rulemaking and "extolled its virtues of efficiency, fairness, and political accountability" (quotation marks and footnotes omitted)).

[10] Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. at 989–1000 (arguing the Court should limit *Chenery* if it overturns *Auer*).

implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4). Thus, if an agency wants to formulate a rule, it must use the notice-and-comment rulemaking procedures. *See* 5 U.S.C. § 553. The Court upheld *Chenery* in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), but did so only with a brief nod to the APA's text in a footnote. *See id.* at 291 n.21.

Second, *Chenery* subverts fair notice by allowing legal retroactivity. In the process of "deferring to agency discretion," the Court in *Chenery* upheld a rule applied for the first time in an adjudication that made illegal conduct that was perfectly legal before that adjudication. In describing the Court's decision as "lawlessness" in his dissent, Justice Jackson noticed the problem from the outset: "This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority." *Chenery*, 332 U.S. at 217 (Jackson, J. dissenting).

Administrative agencies like the NLRB have been allowed to make law—sometimes retroactively—ever since without going through the proper APA procedures, at great cost to administrative due process rights. This Court should address Justice Jackson's warning from long ago and revisit *Chenery* after it overrules *Auer* and *Seminole Rock*.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioner, the Court should overrule *Auer* and *Seminole Rock*.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
FRANK D. GARRISON
C/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
rjl@nrtw.org

January 31, 2019

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR, PETITIONER,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR NATIONAL VETERANS LEGAL SERVICES PROGRAM, MILITARY ORDER OF THE PURPLE HEART, INC., NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM, PROTECT OUR DEFENDERS, AND SERVICE WOMEN'S ACTION NETWORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

BARTON F. STICHMAN
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K Street, N.W.
Suite 500
Washington, DC 20006

AMY MASON SAHARIA
Counsel of Record
LIAM J. MONTGOMERY
WILLIAM T. MARKS
J. MATTHEW RICE
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
asaharia@wc.com

TABLE OF CONTENTS

Page

Interest of amici curiae 1

Summary of argument 4

Argument 6

Auer deference harms veterans seeking disability benefits from the Department of Veterans Affairs 6

A. Application of *Auer* deference to VA regulations harms veterans 6

B. The incentives to draft and retain ambiguous regulations that *Auer* creates harm veterans 14

Conclusion 27

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) ..... *passim*
Boone v. *Lightner*, 319 U.S. 561 (1943) 6, 12
Brodsky v. *U.S. Nuclear Regulatory Comm'n*,
578 F.3d 175 (2d Cir. 2009) 23
Brown v. *Gardner*, 513 U.S. 115 (1994) 7, 17
Cantrell v. *Shulkin*, 28 Vet. App. 382 (2017) 20, 21, 23
Christensen v. *Harris County*,
529 U.S. 576 (2000) 8
Christopher v. *SmithKline Beecham Corp.*,
567 U.S. 142 (2012) 15, 24
Consol. Rail Corp. v. *ICC*,
43 F.3d 1528 (D.C. Cir. 1995) 23
Cook v. *Principi*, 318 F.3d 1334 (Fed. Cir. 2002) 16, 18
Fishgold v. *Sullivan Drydock & Repair Corp.*,
328 U.S. 275 (1946) 7
Gilbert v. *Derwinski*, 1 Vet. App. 49 (1990) 17
Gose v. *U.S. Postal Serv.*,
451 F.3d 831 (Fed. Cir. 2006) 23
Hatlestad v. *Derwinski*, 1 Vet. App. 164 (1991) 16
Henderson v. *Shinseki*, 562 U.S. 428 (2011) 2, 7
Johnson v. *Robison*, 415 U.S. 361 (1974) 6
Kiersey v. *Shinseki*,
486 F. App'x 114 (Fed. Cir. 2012) 9
Kingdomware Technologies, Inc.
v. *United States*, 136 S. Ct. 1969 (2016) 2
Martin v. *O'Rourke*,
891 F.3d 1338 (Fed. Cir. 2018) 19
Pacheco v. *Gibson*, 27 Vet. App. 21 (2014) 9
RLC Indus. Co. v. *Comm'r*,
58 F.3d 413 (9th Cir. 1995) 23
Savage v. *Shinseki*, 24 Vet. App. 259 (2011) 22
Shinseki v. *Sanders*, 556 U.S. 396 (2009) ..... *passim*
Sigma-Tau Pharm., Inc. v. *Schwetz*,
288 F.3d 141 (4th Cir. 2002) 23
Smith v. *Nicholson*,
451 F.3d 1344 (Fed. Cir. 2006) 13

Page

Cases—continued:

Smith v. *Shinseki*, 647 F.3d 1380 (Fed. Cir. 2011) 9
Talk Am., Inc. v. *Mich. Bell Tel. Co.*,
564 U.S. 50 (2011) 16
Urban v. *Shulkin*, 29 Vet. App. 82 (2017) 9
Vilfranc v. *McDonald*, 28 Vet. App. 357 (2017) 14
Walters v. *Nat'l Ass'n of Radiation Survivors*,
473 U.S. 305 (1985) 7, 18

Statutes and regulations:

Veterans' Judicial Review Act, Pub. L. No. 100-687,
§ 301(a), 102 Stat. 4105 (1988) 17
36 U.S.C. § 140501 2
38 U.S.C. § 5902 2
38 U.S.C. § 7252(a) 8
38 C.F.R. § 3.156(c)(1) 9, 12
38 C.F.R. § 3.304(f) 10
38 C.F.R. § 4.16(a) 21
38 C.F.R. § 4.25 14
38 C.F.R. § 14.636 18
Direct Service Connection (Post-Traumatic
Stress Disorder), 58 Fed. Reg. 29,109
(May 19, 1993) 11
Exec. Order 5,398 (July 21, 1930) 17
Service Requirements for Veterans,
69 Fed. Reg. 4,820 (Jan. 30, 2004) 25
VA Compensation and Pension Regulation
Rewrite Project, 78 Fed. Reg. 71,042
(Nov. 27, 2013) 25
VA Compensation and Pension Regulation
Rewrite Project, 83 Fed. Reg. 14,803
(Apr. 6, 2018) 25, 26

Miscellaneous:

Lisa Schultz Bressman, *Beyond Accountability:*
Arbitrariness and Legitimacy in the
Administrative State,
78 N.Y.U. L. Rev. 461 (2003) 16, 23

Page

Miscellaneous—continued:

David Dobbs, *The Post-Traumatic Stress Trap*, Sci. Am. (Apr. 2009) 11
Dep't of Veterans Affairs, Claims Processing Task Force, *Report to the Secretary of Veterans Affairs* (Oct. 2001) <tinyurl.com/VA-task-force-report> 24, 26
H.R. Rep. No. 100-963, 100th Cong., 2d Sess. (1988) 16
Hearing on the Department of Veterans Affairs Claims Adjudication and Pending Legislation Before the Committee, S. Comm. on Veterans' Affairs, 106th Cong., 2d Sess. (2000) (statement of Joseph Thompson, VA Under Sec'y for Benefits) 16
Jonathan Creekmore Koltz, Note, *Unstacking the Deck: In Defense of the Veterans Benefits, Healthcare, and Information Technology Act of 2006*, 17 Fed. Cir. B.J. 79 (2007) 19
John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 15, 26
William A. Moorman & William F. Russo, *Serving Our Veterans Through Clearer Rules*, 56 Admin. L. Rev. 207 (2004) 17, 25
Per Curiam Order, *Cantrell* v. *Shulkin*, No. 15-3439 (Vet App. filed Dec. 1, 2016) 21
Dave Philipps, *Pattern of Misconduct*, Colorado Springs Gazette, Oct. 7, 2013 10
William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA's Regulation Rewrite Project*, 61 Admin. L. Rev. 407 (2009) 17, 18, 25

Page

Miscellaneous—continued:

Nina K. Rytwinski et al., *The Co-Occurrence of Major Depressive Disorder Among Individuals with Posttramatic Stress Disorder: A Meta-Analysis*, 26 J. Traumatic Stress 299, 299 (2013) 11
Nina A. Sayer et al., *A Qualitative Study of Determinants of PTSD Treatment Initiation in Veterans*, 72 Psychiatry: Interpersonal & Biological Processes 238 (2009) 10
Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449 (2011).....15
VA Supp. Br., *Cantrell* v. *Shulkin*, No. 15-3439 (Vet. App. filed Dec. 16, 2016).....22, 23
Veterans Benefits Administration Annual Benefits Report (2017) <benefits.va.gov/REPORTS/abr/>.....10, 14

In the Supreme Court of the United States

No. 18-15

JAMES L. KISOR, PETITIONER,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR NATIONAL VETERANS LEGAL SERVICES PROGRAM, MILITARY ORDER OF THE PURPLE HEART, INC., NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM, PROTECT OUR DEFENDERS, AND SERVICE WOMEN'S ACTION NETWORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici curiae are the National Veterans Legal Services Program, the Military Order of the Purple Heart, Inc., the National Law School Veterans Clinic Consortium, Protect Our Defenders, and the Service Women's Action Network.

Founded in 1980, the National Veterans Legal Services Program (NVLSP) is a nonprofit organization that works to ensure that the Nation's 25 million veterans and active-duty service members have access to the federal benefits to which their military service entitles them.

NVLSP does so in part by serving as a national support center that recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates. For the last 18 years, NVLSP has published the 1,900-page *Veterans Benefits Manual*, the leading practice guide on the subject.

NVLSP also is a veterans service organization recognized by the Secretary of Defense to assist veterans in the preparation, presentation, and prosecution of veterans' benefits claims. *See* 38 U.S.C. § 5902. NVLSP has represented thousands of veterans in proceedings before the Department of Veterans Affairs (VA), the Board of Veterans' Appeals, and the Court of Appeals for Veterans Claims (Veterans Court). In addition, NVLSP has filed numerous amicus briefs in this Court and others, seeking to provide assistance in cases that present issues of broad importance to veterans and the VA benefits system. *See, e.g.*, *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969 (2016); *Henderson* v. *Shinseki*, 562 U.S. 428 (2011); *Shinseki* v. *Sanders*, 556 U.S. 396 (2009).

The Military Order of the Purple Heart, Inc., is a nonprofit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Order is chartered by Congress. *See* 36 U.S.C. § 140501. The Purple Heart is a combat decoration awarded only to those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is also awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action.

Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization com-

posed strictly of combat veterans. The Order conducts welfare, rehabilitation, and service work for hospitalized and needy veterans and their families. The Order's flagship program is its National Service Program, which exists to assist veterans and their families regarding benefits claims.

The National Law School Veterans Clinic Consortium is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. The Consortium's mission is, working with like-minded stakeholders, to gain support and advance common interests with the VA, Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

Protect Our Defenders (POD) is the only national nonprofit organization solely dedicated to ending the epidemic of rape and sexual assault in the military and to combating a culture of pervasive misogyny, sexual harassment, and retribution against victims. POD honors, supports, and gives voice to survivors of military sexual assault and sexual harassment—including service members, veterans, and civilians assaulted by members of the military. POD seeks reform to ensure that all survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice.

The Service Women's Action Network (SWAN) is the leading national organization dedicated to service women and women veterans of the military. Of the more than 40,000 organizations serving the needs of service members, SWAN is the only one solely focused on the needs

of service women, women veterans, and other marginalized populations in the U.S. military.

Amici appear in support of petitioner to explain the harm that deference to VA's interpretations of its own ambiguous regulations inflicts on veterans seeking VA benefits. When courts apply such deference, it nearly always spells defeat for the veteran. That subverts the "special solicitude for the veterans' cause" that "Congress has expressed" and disserves those who have "performed an especially important service for the Nation, often at the risk of his or her own life." *Sanders*, 556 U.S. at 412.[1]

SUMMARY OF ARGUMENT

Under *Auer* v. *Robbins*, 519 U.S. 452 (1997), courts must defer to an administrative agency's interpretation of its own ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." Although the *Auer* doctrine harms many citizens who interact with administrative agencies, it particularly harms veterans, in at least two ways.

A. Congress has long expressed a special solicitude toward veterans, including through the informal and nonadversarial nature of the VA claims-adjudication process. In recognition of Congress's appreciation for veterans' service to the Nation, this Court has held that

---

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Petitioner has consented to the filing of this brief, and respondent has filed a letter with the Clerk consenting to the filing of all amicus briefs.

courts should construe veterans'-benefits laws in favor of veterans.

Application of *Auer* deference to VA's notoriously ambiguous regulations almost always spells defeat for the veteran. *Auer* thus upends the special solicitude owed to veterans by making it harder for veterans to obtain the benefits they earned. Courts, moreover, do not hesitate to find regulations ambiguous, and thus apply *Auer* deference, without engaging in serious regulatory construction. This reflexive deference amplifies *Auer*'s harmful effects on veterans. The result is unfortunate, if predictable: courts have issued numerous decisions of significant importance to veterans nationwide in which they construed regulations in VA's favor—and against veterans.

B. As this Court and commentators have recognized, *Auer* deference incentivizes agencies to promulgate ambiguous regulations. By doing so, agencies can effectively make policy after the notice-and-comment process has concluded by interpreting the ambiguity that the agency itself built into the regulation—unfettered by the protections that notice and comment are meant to provide. And that leeway pertains indefinitely, as an agency can use *Auer* to change the meaning of an ambiguous regulation at any time through informal and even non-public means. For those same reasons, *Auer* discourages agencies from revising ambiguous regulations once they have been promulgated.

The impact of these dynamics on veterans is particularly acute. VA's regulations are already notoriously confusing. The regulations use dense and winding language to describe otherwise simple concepts, and they lack any coherent, organized structure. *Auer* deprives VA of a key incentive to revise and reorganize these reg-

ulations: the threat of having its regulations construed against it during litigation. The result is predictable. VA purposefully retains ambiguous language in its regulations, and the agency still has not revised regulations that it promised to clarify almost 30 years ago.

ARGUMENT

AUER DEFERENCE HARMS VETERANS SEEKING DISABILITY BENEFITS FROM THE DEPARTMENT OF VETERANS AFFAIRS

A. Application Of *Auer* Deference To VA Regulations Harms Veterans

Auer v. *Robbins*, 519 U.S. 452 (1997), directs courts to defer to an administrative agency's interpretation of an ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* at 461 (citation omitted). Although courts and commentators have noted *Auer*'s flaws in many contexts, the doctrine is particularly problematic when applied to the regulations governing veterans' benefits.

1. Congress has long expressed a "special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Ibid.* The veteran's burden also includes "the economic and family detriments which are peculiar to military service." *Johnson* v. *Robison*, 415 U.S. 361, 380 (1974) (citation omitted). In recognition of these sacrifices, Congress has chosen to favor "those who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943).

Congress particularly displays its esteem for veterans in the system it created to adjudicate veterans' disability-benefits claims. The VA claims process "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). When a claim is filed, "the adjudicatory process is not truly adversarial." *Sanders*, 556 U.S. at 412. "[T]he veteran is often unrepresented during the claims proceedings," and "VA has a statutory duty to help the veteran develop his or her benefits claim." *Ibid.* "[I]n evaluating th[e] evidence" supporting the claim, "VA must give the veteran the benefit of any doubt." *Henderson* v. *Shinseki*, 562 U.S. 428, 440 (2011). And if VA denies a claim, the denial "has no formal res judicata effect." *Radiation Survivors*, 473 U.S. at 311. A veteran, in other words, "may resubmit [a previously denied claim] as long as he presents new facts not previously forwarded." *Ibid.*

Recognizing Congress's solicitude for veterans, this Court has "long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 441 (internal quotation marks and citation omitted). That is, when "interpretive doubt" exists in a statute or regulation governing veterans' benefits, the veteran's interpretation generally should prevail. *Brown* v. *Gardner*, 513 U.S. 115, 117-118 (1994). This canon helps to ensure that veterans'-benefits legislation is "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

2. Application of *Auer* deference to VA regulations erects systemic hurdles that contravene the "special solicitude" toward veterans that Congress and this Court have long mandated, perversely making it harder for veterans to obtain the benefits they earned.

a. When courts defer to VA's interpretation of its own regulations under *Auer*, it nearly always spells defeat for the veteran. Because Congress provided for judicial review only of VA's *denial* of benefits, 38 U.S.C. § 7252(a), deferring to VA's regulatory interpretation typically results in the court's adopting the interpretation that precludes the veteran's claim. *Auer* deference thus places a thumb on the scale against veterans when they seek judicial review of VA's decisionmaking. If the veteran's claim turns on the meaning of an ambiguous VA regulation, the denial likely will be affirmed.

That outcome is hard to square with the favor Congress and this Court have shown for veterans. Rather than favor the veteran, *Auer* effectively directs courts to construe regulations *against* the veteran. That improperly circumscribes judicial review of VA's claims-adjudication process and prevents veterans from obtaining the benefits they earned.

b. In addition, *Auer* deference incentivizes courts to avoid careful textual analysis in favor of reflexive deference, all to the detriment of veterans.

Under *Auer*, courts must perform a two-step analysis: determine whether the regulation is ambiguous, and, if it is, defer to the agency's reasonable interpretation of that regulation. *See Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000). But the Veterans Court and the Federal Circuit—like many courts—often defer reflexively to VA under the second step in the

analysis without seriously engaging in the first. That is, instead of grappling with the regulatory text in earnest, courts sometimes will engage in a brief, halfhearted textual analysis before labeling a regulation ambiguous. This has led the courts, including the court of appeals in this case, to rule against the interest of veterans with little consideration of the governing regulations. *See, e.g.*, Pet. App. 14a-17a; *Smith* v. *Shinseki*, 647 F.3d 1380, 1384-1385 (Fed. Cir. 2011); *Kiersey* v. *Shinseki*, 486 F. App'x 114, 116 (Fed. Cir. 2012) (per curiam); *Urban* v. *Shulkin*, 29 Vet. App. 82, 88 (2017); *Pacheco* v. *Gibson*, 27 Vet. App. 21, 25-26 (2014) (en banc) (per curiam).

c. The flaws inherent in the *Auer* doctrine have manifested themselves with respect to various veterans' procedures and benefits, on which thousands of veterans who have honorably served this country depend.

i. This case acutely illustrates the point. Petitioner James Kisor, a Vietnam War veteran, seeks retroactive benefits for his service-connected post-traumatic stress disorder (PTSD). Pet. App. 2a. Whether Mr. Kisor can obtain retroactive benefits turns in part on the meaning of the word "relevant" in a VA regulation. *Id.* at 10a; *see* 38 C.F.R. § 3.156(c)(1). The Board of Veterans Appeals rejected Mr. Kisor's interpretation of the regulation, construing the regulation in VA's favor rather than his. *See* Pet. App. 6a-9a. The Veterans Court affirmed the Board's decision, and the Federal Circuit followed suit. *See id.* at 9a-10a, 14a-17a.

In doing so, the Federal Circuit deferred to VA's interpretation of the term "relevant" under *Auer*. Pet. App. 17a. After summarizing the parties' competing definitions of the term "relevant," the court concluded that the regulation was ambiguous merely because "neither party's position str[uck] [the court] as unreasonable."

Id. at 15a-17a. Although the court stated that "canons of construction do not reveal [the term's] meaning," the court did not actually apply any of those canons—including, most pertinently, the veterans canon. *Id.* at 15a.

The Federal Circuit's deferential interpretation of the reconsideration regulation has significant consequences not just for Mr. Kisor but for veterans as a whole. The right to have a claim reconsidered is vitally important to ensuring that veterans receive proper benefits.

That is especially true with respect to PTSD claims. PTSD is the third most prevalent service-connected disability, affecting over 950,000 veterans. *Veterans Benefits Administration Annual Benefits Report* 71 (2017) <benefits.va.gov/REPORTS/abr/>. VA itself has given PTSD special status among disability claims, providing special evidentiary rules for PTSD claims. *See* 38 C.F.R. § 3.304(f). Ironically, however, this may lead VA and military examiners to be reluctant to diagnose PTSD, for fear of giving veterans the procedural benefits that VA regulations afford them. *See* Dave Philipps, *Pattern of Misconduct*, Colorado Springs Gazette, Oct. 7, 2013 (exposing the pressure placed on Army psychologists to avoid diagnosing soldiers with PTSD to enable rapid discharge or the denial of benefits).

Veterans also have long been reluctant to admit their mental health problems, leading them to avoid seeking help or to hide their problems for months or even years. Nina A. Sayer et al., *A Qualitative Study of Determinants of PTSD Treatment Initiation in Veterans*, 72 Psychiatry: Interpersonal & Biological Processes 238, 238, 244-245 (2009). With records lost and witnesses no longer available, this delay can make it difficult to gather

already scarce evidence related to PTSD claims. *See* Direct Service Connection (Post-Traumatic Stress Disorder), 58 Fed. Reg. 29,109, 29,110 (May 19, 1993) (recognizing that PTSD can "involv[e] stressors which occurred under specific circumstances such as combat or being held as a prisoner-of-war where events can never be fully documented").

Even when veterans do seek help, the symptoms of PTSD are not always facially apparent. In fact, PTSD can be comorbid with other mental-health disorders, such as depression and anxiety. Nina K. Rytwinski et al., *The Co-Occurrence of Major Depressive Disorder Among Individuals with Posttramatic Stress Disorder: A Meta-Analysis*, 26 J. Traumatic Stress 299, 299 (2013) (concluding that 52% of individuals with current PTSD had co-occurring major depressive disorder and that military veterans demonstrated even higher rates of major depressive disorder). Conditions like these can be harder to connect to military service than PTSD—given the procedural benefits afforded to PTSD—causing veterans to labor under misdiagnoses for years, deprived of the help and benefits they so desperately need. *See* David Dobbs, *The Post-Traumatic Stress Trap*, Sci. Am. (Apr. 2009), at 68 ("PTSD is by far the easiest mental health diagnosis to have declared 'service-connected.'").

Mr. Kisor's case painfully invokes these difficult realities. In 2007, a medical professional diagnosed Mr. Kisor with PTSD, concluding that he had had PTSD since 1983, the year VA denied Mr. Kisor's original claim. *See* J.A. 38. But back in 1983—lacking relevant evidence of Mr. Kisor's combat experiences that it should have had before it—VA denied a diagnosis of PTSD, choosing instead to diagnose Mr. Kisor with a non-compensable personality disorder. *See* Pet. App. 3a.

This likely harmed Mr. Kisor in numerous ways, both tangible and intangible. It deprived Mr. Kisor of two decades worth of benefits for PTSD. During that time, Mr. Kisor likely labored under the misimpression that his struggles related to something he was born with, not something caused by his combat experiences in Vietnam, with untold effects on his mental health and the treatment (or lack thereof) that he obtained for his PTSD. And, for over two decades, Mr. Kisor had to live with the reality that his country did not believe him when he told it how terribly he was suffering as a result of "drop[ping] [his] own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575.

The regulation at issue here is meant to provide veterans a straightforward means to remedy precisely this situation. *See* 38 C.F.R. § 3.156(c)(1). If VA had properly applied the regulation, that would not, of course, have rewound the clock on Mr. Kisor's decades of suffering, but it at least would have vindicated him and helped to alleviate the effects of that suffering. Mr. Kisor located evidence that is plainly "relevant" to what VA now admits—that Mr. Kisor has service-connected PTSD. *See* Pet. App. 4a. There is no telling how this evidence might have affected VA examiners' deliberations in the early 1980s, whether as to service connection or the diagnosis of PTSD itself.

Yet this is precisely the burden that VA claims the word "relevant" imposes on a veteran: to reconstruct the "but-for" world from decades prior, in light of the evidence she or he brings forward that VA should have considered at that time. *See* Pet. App. 17a. That is not a reasonable reading of "relevant," and veterans should not be forced to undertake such a counterfactual exercise in order to invoke the straightforward remedy provided

by VA regulations. If the Federal Circuit had not deferred to the agency's interpretation under *Auer*, it would have arrived at the correct result.

ii. *Auer*'s effects on veterans extend beyond the reconsideration regulation. The Federal Circuit also has used *Auer* to uphold limitations on the scope of benefits that veterans are eligible to receive. For example, in *Smith* v. *Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006), Army veteran Ellis Smith reported tinnitus in both of his ears, but VA assigned him the same disability rating that would apply if only one ear was affected (10%). *Id.* at 1346. When Mr. Smith filed his claim for benefits, VA's Diagnostic Code listed tinnitus as a "disease of the ear," and VA's combined ratings table provided that differing disabilities arising from a single disease are to be rated separately unless otherwise provided. *See id.* at 1349. The Veterans Court relied on the plain text of these regulations to conclude that Mr. Smith was entitled to a "rating of 10% for each ear affected by a single case of tinnitus." *Id.* at 1347. But the Federal Circuit reversed, finding the regulations ambiguous. *Id.* at 1350. The court concluded that VA regulations did not expressly address whether a veteran suffering tinnitus in two ears has two, separate disabilities. *Ibid.* And rather than apply the veterans' canon or other standard tools of textual interpretation, the court simply deferred to VA's interpretation under *Auer*. *See id.* at 1350-1351.

Here again, the application of *Auer* had consequences far beyond Mr. Smith: the Federal Circuit itself recognized that its decision addressed an issue with "consequences well beyond th[e] case." *Id.* at 1348. For starters, tinnitus has been the most prevalent service-connected disability of all compensation recipients, affecting over 1.7 million veterans. 2017 *Veterans Benefits*

Administration Annual Benefits Report 71. Tinnitus continues to be the most prevalent service-connected disability of new compensation recipients as well. *Id.* at 70. What is more, the Veterans Court has begun to apply the Federal Circuit's holding to limit dual ratings for medical conditions other than tinnitus. *See Vilfranc* v. *McDonald*, 28 Vet. App. 357, 362-364 (2017) (temporomandibular joints). That holding can dramatically affect the amount of benefits a veteran receives. While ratings for multiple disabilities are not additive under VA's "Combined Ratings Table," the existence of an additional disability can substantially affect a veteran's ultimate disability rating, and thus compensation. *See* 38 C.F.R. § 4.25.

This harm affecting millions of veterans can be traced back to one source: the Federal Circuit's application of *Auer*. There are numerous reasons why *Auer* has no place in American jurisprudence. Its pernicious effect on veterans is a particularly compelling one.

B. The Incentives To Draft And Retain Ambiguous Regulations That *Auer* Creates Harm Veterans

The availability of *Auer* deference also incentivizes VA to draft and retain ambiguous regulations. VA's regulations governing compensation and pension benefits are notoriously confusing. *Auer* deference entrenches this problem. By removing the threat of plenary judicial review, *Auer* deference encourages VA to promulgate ambiguous regulations and discourages it from clarifying the ambiguous regulations it has previously promulgated. The result is that veterans are left to navigate a maze of impenetrable regulations to obtain the benefits they deserve.

1. As this Court has recognized, "[the] practice of deferring to an agency's interpretation of its own ambiguous regulations * * * creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). The reason why is obvious. Agencies cannot "anticipate all of the problems that may arise during the life of a general rule," and the political and monetary costs of rulemaking "rise with each increase in the [rules'] precision and clarity." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 655 (1996). By purposefully enacting vague or ambiguous regulations, an agency can build "a bit of flexibility" into its regulations and "flesh[] * * * out [ambiguities] as the agency gains experience with implementing the regulatory program." Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449, 1459 (2011). And because *Auer* deference authorizes "the agency [to] say what its own regulations mean (unless the agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision." Manning, *supra*, at 655.

Auer's effects reach beyond just the initial drafting stage, however; *Auer* also discourages agencies from later clarifying vague regulations they previously promulgated. "[O]nce an agency has endured the considerable expense and turmoil of writing a rule, it has every incentive to leave well enough alone." Manning, *supra*, at 664 (citation and alteration omitted). *Auer* permits an agency to do just that, "adjust[ing] its policies, where possible, through reinterpretation rather than through amendment." *Ibid.* In other words, *Auer* encourages agencies both to draft opaque and ambiguous

regulations and then to retain those regulations rather than fix them.

These incentives are problematic because they invite agencies to shift policymaking from notice-and-comment rulemaking to "the implementation stage through other means, such as case-by-case adjudication." Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 552 (2003). This in turn "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). As one leading scholar has put it, "the problem might be understood as an end-run around rulemaking in the extreme." Bressman, *supra*, at 552.

2. Here again, these broadly applicable incentives are of particular concern with respect to VA.

a. As VA itself has recognized, "[t]he Veterans Disability Compensation Program is the most complex disability claims system in the Federal government." *Hearing on the Department of Veterans Affairs Claims Adjudication and Pending Legislation Before the Committee, S. Comm. on Veterans' Affairs*, 106th Cong., 2d Sess. 2 (2000) (statement of Joseph Thompson, VA Under Sec'y for Benefits). To obtain disability benefits, "veteran claimants must be personally conversant and proficient with the arcane intricacies of an entitlement program that requires voluminous statutes, regulations, manuals, and circulars to administer." *Cook* v. *Principi*, 318 F.3d 1334, 1357 (Fed. Cir. 2002) (en banc) (Gajarsa, J., dissenting). The Veterans Court has described the layers of rules and regulations as a "confusing tapestry for the adjudication of claims." *Hatlestad* v. *Derwinski*, 1 Vet. App. 164, 167 (1991). Even senior VA officials in

charge of regulation policy lament that VA's regulations "have become progressively complex, difficult to understand, and sometimes ambiguous, causing uncertainty in the claim process and costly litigation." William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA's Regulation Rewrite Project*, 61 Admin. L. Rev. 407, 408 (2009); *see* William A. Moorman & William F. Russo, *Serving Our Veterans Through Clearer Rules*, 56 Admin. L. Rev. 207, 212 (2004).

History explains—to some extent—the ambiguity that plagues VA's regulations. VA has existed for almost 90 years, *see* Exec. Order 5,398 (July 21, 1930), and some of VA's regulations governing compensation have "origins in the 1910s." Pine & Russo, *supra*, at 408. In addition, until 1988, federal courts lacked jurisdiction to review VA's denial of veterans' benefits (except in the case of constitutional challenges). *Gilbert* v. *Derwinski*, 1 Vet. App. 49, 56 (1990); *see* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301(a), 102 Stat. 4105 (1988). Until then, VA stood in "splendid isolation." H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 10 (1988). As this Court recognized, "because Congress took so long to provide for judicial review," VA's regulations enjoyed a largely "unscrutinized and unscrutinizable existence." *Gardner*, 513 U.S. at 122 (citation omitted).

Today, several problems afflict VA's regulatory regime. For starters, the regulations are poorly organized, which "obscures their intended meaning." Pine & Russo, *supra*, at 415 (providing examples). The regulations also use terms inconsistently, employing different words to express the same concept in different regulatory provisions. *Id.* at 414. VA's "convoluted expression of simple concepts," which "makes [these] already technical regu-

lations difficult to understand and apply," further exacerbates these problems. *Id.* at 416.

VA's attempts to reconcile this regulatory morass have not helped. Some regulations contain guidance for VA staff, but the guidance "is unclear in many cases" and "confuses those" who lack "extensive knowledge of the benefit program." Pine & Russo, *supra*, at 416. Other regulations are the subject of binding VA General Counsel opinions, but the opinions "have never been codified into VA's regulations." *Id.* at 419.

Veterans often confront this morass without legal representation. Because the benefits-application process "is designed to function throughout with a high degree of informality," *Radiation Survivors*, 473 U.S. at 311, "the veteran is often unrepresented during the claims proceedings," *Sanders*, 556 U.S. at 412. That is especially true at the initial stages of the adjudication process. *See Cook*, 318 F.3d at 1357. While attorney representation during the adjudication process is permitted, VA's regulations precluding attorney compensation during the initial stages of review hamper veterans' ability to obtain counsel to navigate VA's complex regulatory system. *See* 38 C.F.R. § 14.636.

These realities of the VA system can leave veterans hopelessly lost. Claimants performing regulatory research may find the regulations "difficult to locate and understand." Pine & Russo, *supra*, at 408. Others may find it hard to discern whether they have a viable claim. *Ibid.* The ambiguities tax VA claims examiners as well, who must determine how to apply vague regulations to a given set of facts. *See id.* at 409. This "drains time and money and increases the likelihood of inconsistent outcomes, even among substantially similar claims." *Ibid.*

Unfortunately, "the increased administrative burden on the VA and the growing thicket of VA rules have put paid to th[e] informality and collegiality" that the adjudication process was designed to embody. Jonathan Creekmore Koltz, Note, *Unstacking the Deck: In Defense of the Veterans Benefits, Healthcare, and Information Technology Act of 2006*, 17 Fed. Cir. B.J. 79, 91 (2007). "The present system, having lost its original character, seems exactly the sort of system in which attorneys would excel at aiding claimants to reach a just outcome." *Ibid.* Unrepresented and usually lacking legal expertise, however, veterans find the adjudication process confusing, tiring, and discouraging.[2]

b. *Auer* deference takes this already unmanageable state of affairs and makes it worse. Under *Auer*, VA can

---

[2] The intractable delays that veterans face only further aggravate this dynamic. As the Federal Circuit recently noted, "the average time from [the initiation of a veteran's appeal of a benefit denial] to issuance of a [Board of Veterans Appeals] decision is over five years." *Martin* v. *O'Rourke*, 891 F.3d 1338, 1341-1342 (Fed. Cir. 2018). Mr. Kisor's case illustrates the point: he initiated his claim for reconsideration in June 2006, Pet. App. 4a, and filed his Notice of Disagreement in November 2007, *id.* at 5a. The Board of Veterans Appeals did not issue its decision until April 2014, more than *seven* years later. *Id.* at 26a. And nearly five more years after that, Mr. Kisor's case is still winding its way through the courts. As Judge Moore aptly noted:

> It takes on average six and a half years for a veteran to challenge a [VA benefits] determination and get a decision on remand. God help this nation if it took that long for these brave men and women to answer the call to serve and protect. We owe them more.

Martin, 891 F.3d at 1352 (Moore, J., concurring).

promulgate vague regulations now and flesh out the specifics later, particularly through the case-by-case adjudication of benefits claims. The availability of *Auer* deference also robs VA of any incentive to clarify the myriad ambiguous regulations promulgated long ago: vagueness inures to VA's benefit, and implementing new rules takes significant time and effort. So long as *Auer* shields VA's regulations from plenary judicial review, the status quo will remain.

This concern is not merely academic. The following examples reveal how *Auer* incentivizes VA to promulgate vague rules and removes incentives for it to cure ambiguities in existing regulations.

i. In September 2006, Army veteran Eric C. Cantrell applied for benefits for a service-related digestive disorder that, during flare-ups, required him to visit the restroom 20 times a day. *Cantrell* v. *Shulkin*, 28 Vet. App. 382, 384-385 (2017). Due to this condition, Mr. Cantrell had to resign from his position as a highway patrolman. *Id.* at 385. Mr. Cantrell was then hired as a park ranger, but his employer had to provide extensive accommodations to allow him to continue in his position. *Ibid.* Even with accommodations, Mr. Cantrell's condition " 'ma[de] it difficult for him to perform his job.' " *Ibid.* (quoting 2011 opinion of VA hearing examiner).

During the claims-adjudication process, Mr. Cantrell contended that he was entitled to a disability rating of total disability based on individual unemployability. *Cantrell*, 28 Vet. App. at 385. Under VA regulations, a veteran is entitled to that rating if he or she is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a). The relevant regulation states that "[m]arginal employment shall not be considered substantially gainful

employment" and provides that marginal employment "generally shall be deemed to exist" if the veteran's annual income falls below the federal poverty threshold. *Ibid.* If the veteran's annual income exceeds the poverty threshold, however, marginal employment still "may also be held to exist[] on a facts found basis," including "employment in a protected environment such as a family business or sheltered workshop." *Ibid.* The regulation does not define "employment in a protected environment."

Mr. Cantrell asserted that his work as a park ranger qualified as "employment in a protected environment" given the accommodations necessary to allow him to work there. *Cantrell*, 28 Vet. App. at 386. In 2015, however, the Board of Veterans' Appeals denied his claim for total disability. *Id.* at 386-387. The Board concluded that Mr. Cantrell's employment as a park ranger was "substantially gainful" despite the accommodations. *Id.* at 387. The Board added that Mr. Cantrell's environment was not "marginal employment akin to employment in a protected environment" because, with the accommodations, he could perform full-time work. *Ibid.* Mr. Cantrell appealed to the Veterans Court. *Ibid.*

The court ordered supplemental briefing on the meaning of VA's regulation governing total disability based on individual unemployability. Per Curiam Order 1-2, No. 15-3439 (Vet. App. filed Dec. 1, 2016). The court asked VA (1) for examples of "marginal employment" when earned annual income exceeds the poverty threshold; (2) for the agency's definition of "employment in a protected environment"; and (3) whether the court should defer to that definition. *Ibid.*

Contrary to the court's order, VA did not explain what types of employment qualified as "marginal" if in-

come exceeded the poverty threshold. Instead, VA argued that this undefined language "reflect[ed] the Secretary's intent to defer to the Agency's factual determination of whether marginal employment exists" on a case-by-case basis. VA Supp. Br. 7, No. 15-3439 (Vet. App. filed Dec. 16, 2016); *see id.* at 5. "VA may choose to use abstract language," the agency asserted, "so that the regulation is drawn broadly to allow flexibility in its application to new and unforeseen circumstances." *Id.* at 7. To the extent the appeals court did not find the Secretary's intent to defer to the agency's fact-finding plain from the face of the regulation, VA asked the court to defer to its interpretation under *Auer*. *See id.* at 7-8 (citing *Savage* v. *Shinseki*, 24 Vet. App. 259, 266 (2011), which in turn cites *Auer*).

VA took a similar tack regarding the definition of "employment in a protected environment." The agency asserted that it "ha[d] purposely chosen not to prescribe a precise definition of 'protected environment,' allowing the factfinder to make this determination on a case-by-case basis." VA Supp. Br. 12. And because "[t]he definition * * * is not clear from the plain language of the regulation," VA asked the court to "defer to [its] interpretation that this is a factual determination to be made on a case-by-case basis." *Id.* at 12-13.[3]

---

[3] The government's certiorari-stage brief in this case acknowledged that VA took a similar approach here as to the meaning of "relevant," noting that the Board "did not articulate a comprehensive definition of the term" and instead concluded that the records "were not 'relevant' in the circumstances of this case." U.S. Br. in Opp. 13.

VA's actions in *Cantrell* exemplify the concern that this Court and commentators have expressed regarding *Auer* deference. *See* pp. 15-16, *supra*. VA expressly admitted that it left key substantive terms in a regulation undefined so that it could "preserve the Agency's role in making these determinations on a case-by-case basis." VA Supp. Br. 11. That, of course, is just another way of saying that VA avoided making policy through notice-and-comment rulemaking to give itself flexibility to make law and policy during adjudications. *Cf.* Bressman, *supra*, at 552 (observing that *Auer* "allows agencies to issue vague regulations only to make the actual policy at the implementation stage through other means, such as case-by-case adjudication").

The appeals court in *Cantrell* ultimately did not defer to VA's litigating position. The court reasoned that, because VA chose not to define the relevant terms, there was nothing to which to defer. *See Cantrell*, 28 Vet. App. at 390-391. But it is far from clear that the outcome would have been the same in other courts. VA's decision at a minimum involved application of its own regulation to Mr. Cantrell's case, which some courts have suggested *would* warrant *Auer* deference. *See, e.g.*, *Brodsky* v. *U.S. Nuclear Regulatory Comm'n*, 578 F.3d 175, 182 (2d Cir. 2009); *Sigma-Tau Pharm., Inc.* v. *Schwetz*, 288 F.3d 141, 146 (4th Cir. 2002); *Consol. Rail Corp.* v. *ICC*, 43 F.3d 1528, 1532 (D.C. Cir. 1995). *But see RLC Indus. Co.* v. *Comm'r*, 58 F.3d 413, 415-416 (9th Cir. 1995) (refusing to defer to agency's application of regulation to facts); *Gose* v. *U.S. Postal Serv.*, 451 F.3d 831, 839 (Fed. Cir. 2006) (similar).

In any event, whether or not the Veterans Court properly declined to apply *Auer* deference under then-existing law is not the point. VA's uncharacteristic can-

dor reveals that VA will in fact "promulgate vague and open-ended regulations that [it] can later interpret" if permitted to do so. *Christopher*, 567 U.S. at 158. And then it will use *Auer* to give it the space it needs to accomplish that impermissible goal. In this way, *Auer* deference particularly harms veterans.

ii. VA's Regulation Rewrite Project provides another example of the poor incentives that *Auer* deference creates for VA. In 2001, the Secretary of VA established the VA Claims Processing Task Force, a group tasked with "recommend[ing] specific actions that the Secretary could initiate within his own authority * * * to relieve the current veterans' claims backlog and make claims processing more efficient." Dep't of Veterans Affairs, Claims Processing Task Force, *Report to the Secretary of Veterans Affairs* 1 (Oct. 2001) <tinyurl.com/VA-task-force-report> (VA Task Force Report). The Task Force issued a report outlining its recommendations later that year. *See ibid.*

Among other things, the Task Force identified as an "immediate priority" the relocation of "all regulatory material in regulations that are rewritten and reorganized in a logical, coherent manner." VA Task Force Report, *supra*, at 87. The Task Force observed that, in testimony before Congress 20 years earlier, VA had "promised to clarify" its regulations. *Ibid.* "The problems identified 20 years ago remain today," the Task Force observed, "and the promise to correct them is unfulfilled." *Ibid.* The Task Force added that VA's regulations were "[c]onfusing to even experienced claims examiners" and were "particularly challenging to the many new [Veterans Benefits Administration] employees." *Ibid.*

In 2002, VA began to implement the Task Force's recommendation through the Regulation Rewrite Project. *See* Moorman & Russo, *supra*, at 209. VA issued the first Notice of Proposed Rulemaking (NPRM) in 2004 to revise its compensation and pension regulations. *See* Service Requirements for Veterans, 69 Fed. Reg. 4,820 (Jan. 30, 2004). Over the next nine years, VA issued 19 similar notices relating to other subparts of these regulations. *See* VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. 71,042, 71,042 (Nov. 27, 2013). The agency's plan was that, after receiving comments on each subpart, VA would promulgate a single final NPRM incorporating all of the revised regulations into a new part of the Code of Federal Regulations. Pine & Russo, *supra*, at 410.

VA published the combined NPRM in 2013 and reiterated its intent to publish the regulations as a new, standalone part. *See* VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. at 71,042. VA indicated that, by organizing the new part "so that most provisions governing a specific benefit are located in the same subpart," "claimants, beneficiaries, and their representatives, as well as VA adjudicators, [could] find information * * * more quickly." *Id.* at 71,044. VA recognized that "the validity of the new part * * * may be challenged in the short-term," but it expressed its belief that "rewriting and reorganizing these regulations will be beneficial to veterans." *Id.* at 71,045.

After nearly two decades of work (on a problem VA had recognized a decade before that), VA abruptly reversed course in 2018. The agency rescinded the 2013 NPRM and now proposed to revise its existing regulations "over a number of years" to incorporate the changes it had previously proposed. VA Compensation

and Pension Rewrite Project, 83 Fed. Reg. 14,803, 14,803-04 (Apr. 6, 2018). VA cited administrative constraints to explain why it was not adopting the proposed new part: "[t]his multi-year approach minimizes [the] disruption" that would arise from implementing a complete new set of regulations. *See id.* at 14,804. VA indicated that some changes to the existing regulations were "already underway" but did not provide a timeline for future action. *Ibid.* Although it is unclear how VA will proceed from here, VA's three decades of inaction on this problem do not give cause for hope.

Auer further suffocates that hope. For all of the reasons explained above, *Auer* incentivizes VA to keep in place indefinitely its poorly organized and often-ambiguous regulations. Had courts been construing ambiguities in veterans' favor rather than in VA's favor for the past 30 years, *see* p. 7, *supra*, VA would have been strongly motivated to rewrite its rules to remove such ambiguities. And it would have had to do so in the sunlight provided by notice-and-comment rulemaking.

Auer deference creates the opposite incentive. It allows VA to maintain the status quo and invoke *Auer* deference when ambiguities arise, rather than revising its regulations for the long-term benefit of veterans, their representatives, and VA claims examiners. No matter how long VA waits to revise its regulations (if it does so at all), the agency has little cause for concern so long as *Auer* stands: "the agency bears little, if any, risk of its own opacity or imprecision." Manning, *supra*, at 655. A decision overruling *Auer* may finally spur VA to fix its regulations "in dire need of revision and organization." VA Task Force Report 87.

* * * * *

Auer deference deprives veterans of the benefits they deserve. It encourages courts to defer to VA's interpretation of its own regulations and thus to construe the regulations against the veteran's interests. It also encourages VA to promulgate vague regulations and discourages it from fixing the many problems plaguing its existing regulatory regime. These issues reach far beyond Mr. Kisor himself. They affect millions of veterans across this Nation. The Court should overrule *Auer*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BARTON F. STICHMAN
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K Street, N.W.
Suite 500
Washington, DC 20006

AMY MASON SAHARIA
Counsel of Record
LIAM J. MONTGOMERY
WILLIAM T. MARKS
J. MATTHEW RICE
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
asaharia@wc.com

JANUARY 2019

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR, PETITIONER

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

PHILIP HAMBURGER
MARK CHENOWETH
STEVE SIMPSON
New Civil Liberties Alliance
1225 19th Street NW
Suite 450
Washington, DC 20036
(202) 869-5210

JONATHAN F. MITCHELL
Counsel of Record
106 East Sixth Street
Suite 900
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for Amicus Curiae

TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
Interest of Amicus Curiae 1
Summary of the Argument 2
Argument 5
I. *Auer* Deference Violates Article III by Commanding Judges to Abandon Their Duty of Independent Judgment 6
II. *Auer* Deference Violates the Due Process Clause by Requiring Judges to Display Bias 10
A. Showing Bias Toward an Agency Litigant Violates Due Process 11
B. Showing Bias Against a Litigant Opposed to an Agency's Position Denies Due Process 12
C. Other Canons of Construction Construe Ambiguity Against Government Drafters 13
III. The Doctrine of *Stare Decisis* Cannot Support the Retention of This Unconstitutional Precedent 14
IV. The Court Must Confess Its Constitutional Errors in *Auer* 17
Conclusion 19

TABLE OF AUTHORITIES

Cases

Auer v. Robbins, 519 U.S. 452 (1997) 3
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 3
Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) 11
Cohens v. Virginia, 19 U.S. 264 (1821) 8
Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597 (2013) 4
DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist., 420 U.S. 425 (1975) 13
Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees, 466 U.S. 435 (1984) 5
Graves v. New York, 306 U.S. 466 (1939) 14
Harris v. McRae, 448 U.S. 297 (1980) 4
In re Complaint of Rovas Against SBC Michigan, 754 N.W.2d 259 (Mich. 2008) 9
Int'l Harvester Credit Corp. v. Goodrich, 350 U.S. 537 (1956) 13
King v. Mississippi Military Dep't, 245 So. 3d 404 (Miss. 2018) 10
Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) 15
Lewis v. Casey, 518 U.S. 343 (1996) 15
Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018) 13
Michigan v. EPA, 135 S. Ct. 2699 (2015) 6
Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199 (2015) 3, 7

Rewis v. United States, 401 U.S. 808 (1971) 13
Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 914 N.W.2d 21 (Wis. 2018) 9, 12
United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 15
United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607 (2016) 13
Waters v. Churchill, 511 U.S. 661 (1994) 15

Statutes

5 U.S.C. § 3331 ..... 4, 17
28 U.S.C. § 453 (2012) 12

Other Authorities

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. 1 (1996) 3
Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016) 7, 8, 10
Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago 2014) 7, 8
Philip Hamburger, *Law and Judicial Duty* (Harvard 2008) 6
Joseph Story, *A Familiar Exposition of the Constitution of the United States* (The Classics of Liberty Library 1994). 17
Cass R. Sunstein and Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297 (2017) 4

In the Supreme Court of the United States

No. 18-15

JAMES L. KISOR, PETITIONER

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE[1]

The New Civil Liberties Alliance (NCLA) is a non-profit civil rights organization devoted to defending civil liberties. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and

1. All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current development in American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by how the regime of "*Auer* deference"—like other agency-deference doctrines—requires federal judges to *defer* to another entity's interpretation *of the law*. This requirement represents an abdication of the judicial duty of independent judgment, and it ensconces a systemic bias in the courts in favor of agency litigants. This case presents an opportunity for the Court not only to overturn the doctrine of "*Auer* deference," but also to recognize the constitutional defects of *Auer* and *Seminole Rock*.

SUMMARY OF THE ARGUMENT

The Constitution requires federal judges to exercise independent judgment and refrain from bias when interpreting the law. These are foundational constitutional requirements for an independent judiciary. Article III gives federal judges life tenure and salary protection to

ensure that judicial pronouncements will reflect the judges' independent judgment rather than the desires of the political branches. And the Due Process Clause prohibits judges from displaying any type of bias toward litigants when resolving disputes. These aspects of judicial duty are so axiomatic that they are seldom if ever mentioned or relied upon in legal argument—because to even suggest that a court might depart from its duty of independent judgment or harbor bias toward a litigant would be a scandalous insinuation.

Yet the judiciary has been flouting these foundational constitutional commands by "deferring" to an agency's interpretation of its own rules. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). And while the "*Auer* deference" doctrine has been roundly criticized, the bulk of criticism has focused on *Auer*'s incompatibility with the APA[2] and the bad incentives that *Auer* creates for agency behav-

---

2. *See, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) ("By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures."); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. 1, 9 (1996) ("Section 706 of the APA declares that 'the reviewing court * * * shall determine the meaning or applicability of the terms of an agency action.' On the face of this statute, it is wrong for the courts to abdicate their office of determining the meaning of the agency regulation and submissively give controlling effect to a not-inconsistent agency position.").

ior.[3] As a result, the glaring *constitutional* problems with this court-created deference regime have all too often been overlooked or else relegated to the periphery.[4]

Because NCLA's two main constitutional objections to *Auer*—independent judgment and judicial bias—have not been previously litigated before this Court, *stare decisis* does not bind the Court here. Indeed, because each member of this Court is bound by oath to support and defend the Constitution of the United States, *see* 5 U.S.C. § 3331, he or she has a duty to address and expound *Auer's* constitutional defects. If this Court were considering the constitutionality of a statute, this Court would have reason to avoid pronouncing the statute unconstitutional if a non-constitutional disposition of the case were available.[5] But where this Court is

---

3. *See, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) ("[W]hen an agency interprets its *own* rules, . . . the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect."); Cass R. Sunstein and Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297, 320 (2017) (contending that "the strongest objections to *Auer*" surround the concern "that if those who write laws (regulations) can also interpret them, there is a risk of bias.").

4. *See, e.g.*, Br. for Pet'r (devoting only two pages to the constitutional problems with *Auer* deference).

5. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 306–07 (1980) ("It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons, will inquire first into the statutory question."); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. &*

(continued...)

considering the constitutionality of its own doctrine—a doctrine that commands justices of this Court and judges of lower courts to abandon their independent judgment and exhibit bias in violation of the due process of law—the Court has a duty to act promptly in confessing error and correcting its own unlawful doctrine.

The reputation and enduring institutional legitimacy of this Court depend on its courage in facing up to difficult problems, including its own unconstitutional doctrines. There is no appeal from the erroneous judgments of the Supreme Court except to this Court at a later time, and there is no relief from the Court's own unconstitutional doctrines other than in this Court. Accordingly, any decision that "avoids" recognizing the patent constitutional defects with *Auer* and other agency-deference doctrines would leave Americans without an adequate judicial remedy.

ARGUMENT

The practice of "*Auer* deference" violates the Constitution for two separate and independent reasons. First, *Auer* requires judges to abandon their duty of independent judgment, in violation of Article III and the judicial oath. Second, *Auer* violates the Due Process Clause by commanding judges to exhibit bias toward litigants. We

---

Station Employees, 466 U.S. 435, 444 (1984) ("When the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty.").

will address each of these constitutional violations in turn.

I. *AUER* DEFERENCE VIOLATES ARTICLE III BY COMMANDING JUDGES TO ABANDON THEIR DUTY OF INDEPENDENT JUDGMENT

The first constitutional problem with *Auer* is that it compels judges to abandon their duty of independent judgment. The federal judiciary was established as a separate and independent branch of the federal government, and the duty of independent judgment was understood to be conveyed to the judges at the same time that judicial power was vested in the courts. This duty was, and still is, inherent in the office of a judge. And to protect this independent judgment, the judges of the federal courts were secured in tenure and salary, thus shielding their decisionmaking from the influence of the political branches. *See* U.S. Const. art. III.[6]

Yet *Auer* commands Article III judges to abandon even the pretense of judicial independence by giving automatic weight to an agency's opinion of what its regulations mean—not on account of its persuasiveness, but merely due to the fact that this non-judicial entity has weighed in on the interpretive question before the Court. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("'The judicial power ... requires a court to exercise its independent judgment in interpreting and expounding upon the laws'" (quoting

---

6. For a more elaborate discussion of the duty of independent judgment in American law, *see* Philip Hamburger, *Law and Judicial Duty* 507–35 (Harvard 2008).

Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring))).

Such abandonment of independent judgment would never be tolerated in any other context—even if it were commanded by statute and even if it commanded deference to a truly expert body. Imagine if a statute established a committee of expert law professors and instructed the federal judiciary to "defer" to this committee's announced interpretations of federal regulations so long as they were "reasonable." A statute of this sort would be laughed out of court; it would be declared a gross violation of Article III and a perversion of the independent judgment that the Constitution requires from the judiciary. Yet *Auer* operates precisely the same way: It allows a non-judicial entity to partake in the powers of judicial interpretation, and it commands judges to "defer" to the legal pronouncements of a supposedly expert body external to the judiciary.

Stripped down to its essence, *Auer* is a command that judges abandon their duty of independent judgment and assign weight to a non-judicial entity's interpretation of an agency regulation.[7] It is no different in practice from

---

7. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 316–17 (Chicago 2014); Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187, 1202-03, 1205–10 (2016). Hamburger writes that "the deference to interpretation is an abandonment of judicial office. The Constitution grants judicial power to the courts, consisting of judges, who were assumed to have an office or duty of independent judgment. The Constitution thereby establishes a structure for providing parties with the independent judgment of the judges, and this means their own, personal judgment, not (continued...)

an instruction that courts assign weight and defer to interpretations of agency regulations announced by a congressional committee, a group of expert legal scholars, or the New York Times editorial board. In each of these scenarios, the courts would be following another entity's interpretation of an agency rule so long as it were "reasonable"—even if the court's own judgment would lead it to conclude that the regulation means something else.

A judge who behaved in such a manner would be accused of gross dereliction of duty and violating Article III, which not only empowers but requires the courts to resolve the "cases" and "controversies" in their jurisdiction,[8] and which makes no allowance for judges to abandon their duty to exercise their own independent judgment, let alone rely upon the judgment of entities that

---

deference to the judgment of the executive, let alone the executive when it is one of the parties. Nonetheless, the judges defer to judgments of the executive, and they thereby deliberately deny the benefit of judicial power to private parties and abandon the central feature of their office as judges." Hamburger, *Is Administrative Law Unlawful?* at 316. Hamburger also writes: "Judges, in adjudicating their cases, . . . have the duty to exercise their own independent judgment about what the law is, including their own independent judgment about the interpretation of the law. Accordingly, when judges defer to agency judgments about . . . interpretation, the judges abandon their very office or duty as judges." Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. at 1249-50.

8. *See Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

are not independent and do not enjoy life tenure or salary protection. The constitutional offense is even greater when judges behave this way in lockstep under the command of the Supreme Court.

To be clear, there is nothing at all wrong or constitutionally problematic about a court that considers an agency's interpretation of a regulation and gives it weight according to its persuasiveness. *See, e.g.*, *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them."); *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 270 (Mich. 2008) ("'Respectful consideration' is not equivalent to any normative understanding of 'deference' as the latter term is commonly used in appellate decisions."). An agency is entitled to have its views heard and considered by the court, just as any other litigant or amicus party, and a court may and should consider the "unique insights" an agency might bring on account of its expertise and experience. *Tetra Tech*, 914 N.W.2d at 53; *see also id.* ("'[D]ue weight' means giving 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law. . . . 'Due weight' is a matter of persuasion, not deference."). None of this respectful consideration compromises a judge's duty of independent judgment. But *Auer* requires far more; it commands that courts give weight to those views simply because the agency espouses them, and it instructs courts to subordinate their own judgments to

the views expressed by the agency. The duty of independent judgment allows courts to consider an agency's views and to adopt them *when persuasive*, but it absolutely forbids a regime in which courts "defer" or give automatic weight to a non-judicial entity's interpretations of regulatory language.[9]

II. *AUER* DEFERENCE VIOLATES THE DUE PROCESS CLAUSE BY REQUIRING JUDGES TO DISPLAY BIAS

A related and even more serious problem is that *Auer* deference removes the judicial blindfold. It requires judges to display systematic bias toward agencies—and against their counterparties—when they appear as litigants.[10] It is bad enough that a judge would abandon his Article III duty of independent judgment by "deferring" to a non-judicial entity's interpretation of a statute. But for a judge to abandon his independent judgment in a manner that favors an actual *litigant* before the court is an abomination.

---

9. *See, e.g.*, *King v. Mississippi Military Dep't*, 245 So. 3d 404, 408 (Miss. 2018) (rejecting judicial deference to agency interpretations of statutes because such deference prevents courts from "fulfilling their duty to exercise their independent judgment about what the law *is*." (quoting *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring))).

10. *See generally* Philip Hamburger, *Chevron Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). Hamburger explains that "the Constitution prohibits judges from denying the due process of law, and judges therefore cannot engage in systematic bias in favor of the government. Nonetheless, judges defer to administrative interpretation, thus often engaging in systematic bias for the government and against other parties." *Id.* at 1250.

A. Showing Bias Toward an Agency Litigant Violates Due Process

This Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet *Auer* institutionalizes a regime of systematic judicial bias by requiring courts to "defer" to agency litigants whenever the parties dispute the meaning of an agency regulation. Rather than exercise their own judgment about what the law is, judges under *Auer* consciously defer to the judgment of one of the litigants before them.

A judge who openly admits that he accepts a plaintiff's interpretation of agency regulations whenever it is "reasonable"—and that he automatically rejects any competing and perhaps more reasonable interpretation that might be offered by a defendant—would be impeached and kicked off the bench for bias and abuse of power. Yet this is exactly what judges do whenever they apply "*Auer* deference" in cases where the agency appears as a litigant. The government litigant wins as long its preferred interpretation of the regulation seems "reasonable"—even if it is wrong—while the opposing litigant gets no such indulgence from the court and must show that the government's view is not merely wrong but *unreasonably* so.

All federal judges take an oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent

upon me."[11] And judges are ordinarily very scrupulous about living up to these commitments. Nonetheless, under *Auer*, judges who are supposed to administer justice "without respect to persons" peek from behind the judicial blindfold and precommit to favoring the government agency's position.

Whenever *Auer* is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's interpretation of the law. *See Tetra Tech*, 914 N.W.2d at 50 (prohibiting *Chevron* deference in the Wisconsin state courts because its "systematic favor deprives the non-governmental party of an independent and impartial tribunal.").

B. Showing Bias Against a Litigant Opposed to an Agency's Position Denies Due Process

Even when the government is not a litigant, but appears as an amicus curiae (or when the Solicitor General is invited to participate in a case), deferring to the government's position under *Auer* still denies due process to whichever litigant stands opposed to the government's position. Rather than have the opportunity to convince

---

11. 28 U.S.C. § 453 (2012) ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.'").

an impartial magistrate of the rightness of the litigant's cause, that litigant is forced to try to overcome the government's thumb on the scale for her opponent. Such favoritism may happen even when the government's position is created in the course of that very litigation. *See, e.g.*, *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari) (criticizing the Seventh Circuit for deferring under *Auer* to an agency's interpretation of its rules that was set forth in an amicus brief); *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (holding that agency and judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by . . . bias").

C. Other Canons of Construction Construe Ambiguity Against Government Drafters

Of course, *Auer* might be defended on the ground that there are other canons of construction that purport to stack the deck in favor of a litigant appearing before the court. *See, e.g.*, *Int'l Harvester Credit Corp. v. Goodrich*, 350 U.S. 537, 547 (1956) ("[A] question as to the meaning of a taxing act to be read in favor of the taxpayer."); *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975) ("[L]egal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible

scope."). These canons give a boost to those who litigate *against* the government, and they seek to encourage clear and precise drafting of tax laws, criminal statutes, and treaties with Indian tribes. They therefore cannot explain or excuse a practice that weights the scales *in favor of* a government litigant—the most powerful of all parties to appear before a court—and that commands systematic bias in favor of the government's preferred interpretations of agency regulations.

III. The Doctrine of *Stare Decisis* Cannot Support the Retention of This Unconstitutional Precedent

Defenders of *Auer* will no doubt try to salvage the doctrine by invoking *stare decisis*—and act as though there is some binding legal obligation to adhere to this precedent, notwithstanding its blatant unconstitutionality. This Court should reject emphatically any attempt to defend *Auer* on *stare decisis* grounds.

First, and most basically, a judge's ultimate duty is to follow the law—in this case, the Constitution—even if that comes at the expense of a judicial precedent. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

Second, neither *Auer* nor *Seminole Rock* even considered or addressed this brief's brace of constitutional objections to a regime of agency deference—and neither has any subsequent decision of this Court. So it cannot be said that this Court has rejected these constitutional arguments by adhering to *Auer* for 22 years, or by adhering to *Seminole Rock* for 74 years. Judicial prece-

dents do not resolve issues or arguments that were never raised or discussed. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("[C]ases cannot be read as foreclosing an argument that they never dealt with.").[12] *Stare decisis* therefore cannot excuse this Court from recognizing these constitutional concerns and declaring *Auer* deference unconstitutional.

Third, *Auer* is not an ordinary precedent because this Court did not simply make an error in that case about an unconstitutional act by another branch of government; rather the Court itself created a doctrine that violates the Constitution. If this Court in *Auer* had mistakenly upheld an unconstitutional statute, then this Court would not have acted unconstitutionally, but simply would have erred. In *Auer*, however, the justices, acting for the Court, abandoned their Article III duty of independent judgment; further, they engaged in bias in favor of one of the parties in violation of the Fifth Amendment's guarantee of due process of law. They even required all judg-

12. *See also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) (holding that when "standing was neither challenged nor discussed" in an earlier case, that case "has no precedential effect" on the issue of standing); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

es, high and low, to engage in such violations of the Constitution.

Regrettably, therefore, it is difficult to avoid the conclusion that in *Auer* this Court itself acted unconstitutionally. And where this Court is reconsidering its own unlawful doctrine in a prior case, the judges cannot attribute much precedential weight to that case without making it impossibly difficult for the Court to correct its own past Constitutional transgressions.

The only appeal from this Court's unlawful acts, let alone its mere errors, is to this Court at a later time. Although this means that this Court is not legally accountable to any other branch of government, it also means that this Court must be especially open to holding itself accountable. Otherwise, there would no judicial remedy against this Court's own errors and injustices. Although lower courts must avoid departing from high-court precedent, this highest of courts must avoid embracing so strong an attachment to precedent as to prevent it from reconsidering its own errors and even its own unconstitutional doctrines.

Fourth, this Court's duty to overrule *Auer* is reinforced by the damage done by that case to the Court's reputation. Of course, judges should never depart from the law—not even on account of concerns for the judiciary's reputation. But they should keep in mind that their reputation for integrity depends on their adhering to the law and that to preserve this reputation they need to be willing to correct their errors. Every day that *Auer* remains law, this Court bars Americans from obtaining im-

partial adjudications on administrative rules. Every day, therefore, *Auer* erodes this Court's legitimacy.

As Justice Story predicted, "[I]f any changes shall hereafter be proposed, which shall diminish the just authority of this, as an independent department, they will only be matters of regret, so far as they may take away any checks to the exercise of arbitrary power by either of the other Departments of the Government." Joseph Story, *A Familiar Exposition of the Constitution of the United States* ch. 30, § 305, p. 185 (The Classics of Liberty Library 1994). Story had in mind primarily threats to the tenure of judges, but in diminishing the just authority of the judiciary as an independent department, *Auer* deference has surely become a "matter of regret." *Id.*

IV. The Court Must Confess Its Constitutional Errors in *Auer*

Indeed, because each member of this Court is bound by oath to support and defend the Constitution of the United States, *see* 5 U.S.C. § 3331, he or she has a duty to address and expound *Auer's* constitutional defects.

If this case concerned the possible unconstitutionality of a statute, this Court could hold it unconstitutional only if it were manifestly or evidently unlawful, and this Court would ordinarily have reason to avoid holding it unconstitutional if there were a non-constitutional ground for its decision.[13] But because this Court is considering the constitutionality of a doctrine of its own making, the justices are not limited by these ordinary

---

13. *See* note 5, *supra*.

limitations on holding an act unconstitutional. Indeed, because the Court is considering its own unconstitutional doctrine in *Auer*, the justices have a duty, at least under their oath, to rest their decision candidly on the doctrine's constitutional failings.

This is all the more necessary because *Auer* requires not only the justices but all other judges to abandon their independent judgment and to engage in bias that denies litigants the due process of law. *Auer* thereby infects the entire judicial system.

The reputation of this Court rests on more than simply the correction of its past errors—though that is important. Its reputation also rests on its courage in candidly facing up to difficult problems, including its own violations of the Constitution. As already noted, there is no appeal from this Court except to this Court at a later time, and no justice against the Court's own unconstitutional doctrines other than in this Court. The American people must therefore have confidence that this Court will not hide from its own errors, let alone its own departures from law. Far from preserving this Court's reputation, any decision that "avoids" recognizing the patent constitutional defects with agency-deference doctrines would leave Americans with the impression that the Court lacks the courage to confront its own past mistakes.

This Court is not accountable to previous litigants whom *Auer* deference has harmed. But it is intellectually and morally accountable, and it should embrace this opportunity to recognize the full extent of the problems with *Auer* deference. This doctrine's shortcomings in-

volve the most fundamental attributes of the federal judiciary—independent judgment and avoiding bias—and this Court must set the record straight on these matters as forthrightly as possible to atone for the damage this doctrine has done.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PHILIP HAMBURGER
MARK CHENOWETH
STEVE SIMPSON
New Civil Liberties Alliance
1225 19th Street NW
Suite 450
Washington, DC 20036
(202) 869-5210

JONATHAN F. MITCHELL
Counsel of Record
106 East Sixth Street
Suite 900
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

January 31, 2019

No. 18-15

In the
Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CHANTELL AND MICHAEL SACKETT, AND DUARTE NURSERY, INC. IN SUPPORT OF PETITIONER

TODD F. GAZIANO
THOMAS A. BERRY
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
(202) 888-6381

ANTHONY L. FRANÇOIS*
**Counsel of Record*
DAMIEN M. SCHIFF
DANIEL M. ORTNER
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
TFrancois@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Chantell and Michael Sackett, and Duarte Nursery, Inc.

QUESTION PRESENTED

Auer v. Robbins, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation. Separately, in *Brown v. Gardner*, 513 U.S. 115, 118 (1994), the Court held that "interpretive doubt is to be resolved in the veteran's favor."

Petitioner, a Marine veteran, seeks disability benefits for his service-related post-traumatic stress disorder (PTSD). While the Department of Veterans Affairs (VA) agrees that Petitioner suffers from service-related PTSD, it has refused to award him retroactive benefits. The VA's decision turns on the meaning of the term "relevant" as used in 38 C.F.R. § 3.156(c)(1).

Below, the Federal Circuit found that Petitioner and the VA both offered reasonable constructions of that term. On that basis alone, the court held that the regulation is ambiguous, and—invoking *Auer*—deferred to the VA's interpretation of its own ambiguous regulation. The question presented is:

1. Whether the Court should overrule *Auer* and *Seminole Rock*.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. *AUER* TOWN—THE COMPANY TOWN THAT BETRAYS THE ORIGINAL PROMISE OF PROTECTED INDIVIDUAL LIBERTY THROUGH SEPARATION OF POWERS 6

II. *AUER* TOWN—NO LEGISLATORS HEEDED 11

A. *Auer* Is Particularly Egregious Since It Applies to Rules Even Where Agencies Violate Their Rulemaking Duties Under the Congressional Review Act 11

B. *Auer* Extends the Already Dubious Allowance for Delegation of the Legislative Power to the Executive 19

III. *AUER* TOWN—NO JUDGES WELCOME 22

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

Bond v. United States,
564 U.S. 211 (2011) 7, 23

Boumediene v. Bush,
553 U.S. 723 (2008) 6

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 4, 21, 27

Brown v. Gardner,
513 U.S. 115 (1994) i

Buckley v. Valeo,
424 U.S. 1 (1976) 6

Chevron v. NRDC,
467 U.S. 837 (1984) 5, 19-20

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 21

Clinton v. City of New York,
524 U.S. 417 (1998) 7

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 557 U.S. 261 (2009) 15

Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp., York Cty., Pa., Located on Tax ID #440002800150000000 Owned by Brown, 768 F.3d 300 (3d Cir. 2014) 22

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) 2, 11, 20, 26

Egan v. Delaware River Port Auth.,
851 F.3d 263 (3d Cir. 2017) 20-22

Ellis-Hall Consultants v. Pub. Serv. Comm'n,
379 P.3d 1270 (Utah 2016) 26

Foster v. Vilsack,
820 F.3d 330 (8th Cir. 2016), *cert. denied*,
137 S. Ct. 620 (2017) 1

Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477 (2010) 6

G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.,
822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) 16

Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm,
136 S. Ct. 2442 (2016) 1

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016) 20-21, 25-26

In re: EPA,
803 F.3d 804 (6th Cir. 2015) 3

INS v. Chadha,
462 U.S. 919 (1983) 6

Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan,
555 U.S. 285 (2009) 18

Kisor v. Shulkin,
869 F.3d 1360 (Fed. Cir. 2017) 18

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 22

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991) 26

Myers v. United States,
272 U.S. 52 (1926) 6

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
138 S. Ct. 617 (2018) 1, 3

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 27

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015) ..... *passim*

Rapanos v. United States,
547 U.S. 715 (2006) 2-3

Sackett v. EPA,
566 U.S. 120 (2012) 2, 17

Talk Am., Inc. v. Mich. Bell Tel. Co.,
564 U.S. 50 (2011) 8

Washington Cattlemen's Association v. EPA,
No. 15-4188 (6th Cir.) 3

U.S. Army Corps of Engineers v. Hawkes Co., Inc.,
136 S. Ct. 1807 (2016) 2

Unites States v. Brown,
381 U.S. 437 (1965) 6

Constitution

U.S. Const. art. III, § 1 22

Statutes

5 U.S.C. § 551 12

5 U.S.C. § 551(4) 12

5 U.S.C. § 801, *et seq.* 12

5 U.S.C. § 801(a)(1)(A) 12

5 U.S.C. § 801(b). 12

5 U.S.C. § 802 12

5 U.S.C. § 804(c) 12

Indirect Auto Lending Act,
Pub. L. No. 115-172 (2018)..... 14-15

Regulation

38 C.F.R. § 3.156(c)(1)..... 18

Rule

U.S. Sup. Ct. R. 37.3..... 1

Legislative Material

142 Cong. Rec. E575 (daily ed. Apr. 19, 1996)..... 12

142 Cong. Rec. E578 (daily ed. Apr. 19, 1996)..... 13

142 Cong. Rec. S3683 (daily ed. Apr. 18, 1996)..... 12

142 Cong. Rec. S3687 (daily ed. Apr. 18, 1996).. 12-13

Cong. Research Serv., R40997,
Congressional Review Act: Rules Not Submitted to GAO and Congress (2009),
https://www.redtaperollback.com/wp-content/uploads/2017/04/CRS122909.pdf..... 13-14

U.S. Gov't Accountability Office,
Federal Rulemaking: Perspectives on 10 Years of Congressional Review Act Implementation,
GAO-06-601T (2006), http://www.gao.gov/assets/120/113245.pdf..... 14

U.S. Gov't Accountability Office,
https://www.gao.gov/legal/other-legalwork/congressonal-review-act?fedRuleSearch=regas&report=&agency=All&type=All&priority=All&begin_date=mm%2Fdd%2Fyyyy&end_date=01%2F21%2F2019&begin_eff_date=mm%2Fdd%2Fyyyy&end_eff_date=12%2F31%2F2020&begin_gao_date=mm%2Fdd%2Fyyyy&end_gao_date=01%2F21%2F2019&searched=1&Submit=Search#database 16

Other Authorities

Adler, Jonathan H.,
Auer *Evasions*,
6 Geo. J.L. & Pub. Pol'y 1 (2018) 7

Anthony, Robert A.,
The Supreme Court and the APA: Sometimes They Just Don't Get It,
10 Admin. L.J. Am. U. 1 (1996) 11

Barnett, Randy R.,
Our Republican Constitution: Securing the Liberty and Sovereignty of We the People (2016) 22

Copeland, Curtis W.,
Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress (2014), https://www.redtape rollback.com/wp-content/uploads/2017/05/CurtisCopelandCongressionalReviewActManyRecentFinalRulesWereNotSubmittedtoGAOandCongress07-15-2014.pdf 14

Dudley, Susan E.,
CRAzy After All These Years: Extending the Reach of the Congressional Review Act,
Forbes (Mar. 7, 2017), https://www.forbes.com/sites/susandudley/2017/03/07/crazy-after-all-these-years-extending-the-reach-of-the-congressional-review-act/#2c52e00d24b8 14

EPA,
Section 404 of the Clean Water Act, 2008 Rapanos Guidance and Related Documents,
https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents 2-3, 17-18

Ginsburg, Douglas H. & Menashi, Steven,
Our Illiberal Administrative Law,
10 N.Y.U. J.L. & Liberty 475 (2016)..... 8

Harrington, James,
The Commonwealth of Oceana (1656), *reprinted in Cambridge Text in the History of Political Thought*,
22 (James G. Pocock ed., 1992)..... 9

Hamburger, Philip,
Is Administrative Law Unlawful? (2014)..... 23-24

Healy, Michael P.,
The Past, Present and Future of Auer *Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*,
62 U. Kan. L. Rev. 633 (2014)..... 9

Huq, Aziz Z. & Michaels, Jon D.,
The Cycles of Separation-of-Powers Jurisprudence,
126 Yale L.J. 346 (2016)..... 7

Kaplinsky, Alan S. & Willis, Christopher J.,
Congress disapproves CFPB Bulletin concerning discretionary pricing by auto dealers, Consumer Finance Monitor (May 8, 2018), https://www.consumerfinancemonitor.com/2018/05/08/congress-disapproves-cfpb-bulletin-concerning-discretionary-pricing-by-auto-dealers/ 15

Kavanaugh, Brett M.,
Fixing Statutory Interpretation,
129 Harv. L. Rev. 2118 (2016) 27

Leske, Kevin O.,
A Rock Unturned: Justice Scalia's (Unfinished) Crusade Against the Seminole Rock *Deference Doctrine*, 69 Admin. L. Rev. 1 (2017)..... 10

Madison, James,
1 Annals of Congress 6

Manning, John F.,
Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,
96 Colum. L. Rev. 612 (1996) ..... *passim*

Marisam, Jason,
Constitutional Self-Interpretation,
75 Ohio St. L.J. 293 (2014) 10

Merrill, Thomas W. & Watts, Kathryn Tongue,
Agency Rules with the Force of Law: The Original Convention,
116 Harv. L. Rev. 467 (2002) 8

Redtape Rollback,
Pacific Legal Foundation,
Redtaperollback.com/rules 18

Sharp, Malcom P.,
The Classical American Doctrine of "The Separation of Powers",
2 U. Chi. L. Rev. 385 (1935) 6

The Federalist
No. 48 (James Madison) 24

The Federalist
No. 78 (Alexander Hamilton) 23

Vermeule, Adrian,
Contra Nemo Iudex in Sua Causa: The Limits of Impartiality, 122 Yale L.J. 384 (2012) 9-10

Walker, Chris,
Auer *Deference Inside the Regulatory State: Some Preliminary Findings*, Notice & Comment: (Sept. 14, 2016), http://yalejreg.com/nc/auer-deference-inside-the-regulatory-state-some-preliminary-findings/ 21

Walker, Christopher J.,
Chevron *Inside the Regulatory State: An Empirical Assessment*,
83 Fordham L. Rev. 703 (2014)..... 21

Walker, Christopher J.,
Legislating in the Shadows,
65 U. Pa. L. Rev. (2017),
https://ssrn.com/abstract=2826146..... 20

Yeatman, William,
An Empirical Defense of Auer *Step Zero*,
106 Geo. L.J. 515 (2018)..... 25

Yale, D.E.C.,
Iudex in Propria Causa: An Historical Excursus,
33 Cambridge L.J. 80 (1974)..... 8

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation, Chantell and Michael Sackett, and Duarte Nursery, Inc., submit this brief amicus curiae in support of Petitioner James Kisor.[1] All parties have consented to the filing of this amicus brief. Amici's interest in this case derives from their various experiences with federal agency re-interpretation of regulations adopted under the Clean Water Act and related federal statutes.

Amicus Pacific Legal Foundation is the most experienced public interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving the role of the Article III courts as an independent check on the Executive Branch under the Constitution's Separation of Powers, including cases considering the contemporary practices of judicial deference to agency interpretations of statutes and regulations. *See, e.g., Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018) (interpretation of Clean Water Act venue statute); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017) (*Auer* deference to agency staff testimony);

---

[1] All parties have consented to the filling of this brief. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

U.S. Army Corps of Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "navigable waters").

Amici Chantell and Michael Sackett are the plaintiffs in *Sackett v. EPA*, presently pending on remand from this Court, in the U.S. District Court for the District of Idaho, case no. 2:08-cv-00185-N-EJL.[2] The Sacketts are challenging an administrative compliance order issued by the Environmental Protection Agency, which directs them to restore a home site they own near Priest Lake, Idaho, on the ground that their property contains navigable waters for which no dredge and fill permit will be issued under the Clean Water Act. *See generally*, *Sackett v. EPA*, 566 U.S. at 122. The sole issue in the Sacketts' challenge to the compliance order is whether their property contains federally protected navigable waters under the Clean Water Act. EPA defends its jurisdictional determination in part based upon its 2008 post-*Rapanos* Guidance, which purports to re-interpret the agency's regulations defining "navigable waters" under the Clean Water Act in light of this Court's fractured decision in *Rapanos*, 547 U.S. 715.

---

[2] The Sacketts' case was promptly remanded from this Court back down to the district court in 2012. There, the case has been fully briefed on cross motions for summary judgment and awaiting decision since January of 2016. As the late Justice Scalia wrote in *Sackett v. EPA*, the "Sacketts . . . are feeling their way." 566 U.S. at 124. Unfortunately, they have not been able to do so very quickly.

EPA argues to the District Court below that it is obliged to defer to the post-*Rapanos* Guidance under *Auer*. A decision of this Court in favor of Petitioner in this case would likely assist the District of Idaho in ruling on the Sacketts' pending summary judgment motion.

Amicus Duarte Nursery, Inc., is a farming company in California, with an ongoing interest in the scope of the federal government's exercise of regulatory authority over farming practices under the Clean Water Act. Duarte Nursery was a petitioner in *Washington Cattlemen's Association v. EPA* in the Sixth Circuit, Case No. 15-4188, which challenged EPA's 2015 regulation defining "navigable waters" under the Clean Water Act. *See generally In re: EPA*, 803 F.3d 804 (6th Cir. 2015). Duarte Nursery, Inc., was also a respondent before this Court in *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018), which held that the federal district courts, rather than the Sixth Circuit, have jurisdiction over Duarte Nursery's claims. The role of the post-*Rapanos* Guidance and related agency re-interpretations of Clean Water Act regulations is an ongoing issue in both the pending litigation challenging the 2015 EPA regulation redefining "navigable waters" and EPA's ongoing effort to revise those regulations yet again.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States government, as established by the Constitution, governs a republic whose citizens' liberty is protected by the separation of law-making, law-enforcement, and law-interpretation between the

Legislative, Executive, and Judicial branches. The practical purpose of that separation is to prevent any one agency from becoming so mighty in its enforcement power that it can convert the republic into what is essentially a company town: a community with no democratically elected council, and no independent judges. In such a town, the company decides what the rules are, enforces the rules, changes the rules (through "interpretation" of them), and then tells the judges what the rules mean. All of this is done to restrict the liberty of the citizenry, and to aggrandize the power of the company.

This Court's decisions in *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.* have unfortunately enabled just this conversion of our executive agencies, from a checked and balanced branch of a tripartite government, into the unchecked and dominant power in what increasingly looks and feels like an old-fashioned company town, whose citizens have to take what the company says and like it, or else.

Auer deference allows agencies to flout the Congress in two important ways. First, Congress mandates that federal agencies submit all their "rules" to Congress for review and potential disapproval before such rules are legally in effect, under the Congressional Review Act. The very types of policy memoranda, guidance documents, and adjudicative interpretations of agency regulations to which *Auer* applies are covered by the Congressional Review Act, and yet agencies routinely flout their obligation to submit those rules to Congress for review and potential disapproval. So agencies thwart effective legislative branch checks under the

Congressional Review Act, while telling the judicial branch to defer to these selfsame rules.

Auer also exacerbates the already questionable judicial practice of deference to agency regulatory interpretations of statutes under *Chevron v. NRDC*, 467 U.S. 837 (1984). *Chevron* allows agencies to bind the courts to their regulatory interpretations of ambiguous statutes, but does not require regulations to be clear. *Auer* allows agencies to regulate ambiguously and then interpret those regulations to taste later, with the expectation of forcing such re-interpretations on the courts. This second level of deference to agency law making increasingly obscures Congress' constitutional role as the lawmaker. The consequence of *Auer* is not merely the transfer of Congress' legislative power to the executive branch, but the near complete erasure of Congress' legislative power itself.

And, as numerous members of this and other courts have observed, *Auer* deference allows executive agencies to transgress on the judiciary, by taking from it the inherently judicial power to "say what the law is." This dynamic converts the judiciary from a check and balance on the executive into a rubber stamp.

Whatever the original rationale for *Auer* deference, its sad consequences for liberty and constitutional government require that this Court overturn it. It is time to end the unchecked power of the executive branch. It is time to turn the company town back into a constitutional republic, and thereby protect individual liberties, which depend on separated powers.

ARGUMENT

I

AUER TOWN—THE COMPANY TOWN THAT BETRAYS THE ORIGINAL PROMISE OF PROTECTED INDIVIDUAL LIBERTY THROUGH SEPARATION OF POWERS

"Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). The Founders believed that this division[3] was an elemental part of the design for just government. *See Myers v. United States*, 272 U.S. 52, 116 (1926) ("If there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive and judicial powers.") (quoting James Madison, 1 Annals of Congress 581). Born of the Founders' distrust of government power, *Boumediene v. Bush*, 553 U.S. 723, 742 (2008), the separation of powers constitutes one of the Constitution's key structural protections against tyranny. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny."); *Unites States v. Brown*, 381 U.S. 437, 443 (1965) ("This 'separation of powers' was

---

[3] "Aristotle's Politics contains what is commonly taken to be the original statement of the doctrine." Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. Chi. L. Rev. 385, 387 (1935).

obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny."). The separation of powers therefore serves to protect individual liberty. *Bond v. United States*, 564 U.S. 211, 223 (2011) ("[I]ndividuals, too, are protected by the operations of separation of powers . . . ."). *See Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."). Indeed, this liberty-protecting aspect of the doctrine has received particular emphasis in the Court's recent separation-of-powers cases. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 Yale L.J. 346, 382-83 (2016).

An important liberty-protecting part of the separation of powers as crafted by the Framers is the assignment of law-making and law-interpretation to different branches of government. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 641 (1996) ("[T]he founders took special pains to limit Congress's direct control over the instrumentalities that implement its laws."); Jonathan H. Adler, *Auer* Evasions, 16 Geo. J.L. & Pub. Pol'y 1, 14 (2018) ("The combination of the law-making and law-interpreting functions was viewed with suspicion at the time of the nation's founding because it was feared that such concentration of power facilitated the abuse of government power."). That desire had a distinguished pedigree: Montesquieu, Locke, and Blackstone all considered the separation of law-making and law-interpretation to be important in

furthering the rule of law and limiting arbitrary government.[4] Manning, *supra*, at 646-47.

Auer, however, conflicts with this aspect of the separation of powers. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (*Auer* deference "seems contrary to fundamental principles of separation of powers [because it] permit[s] the person who promulgates a law to interpret it as well."). As Dean Manning explained in his classic article on the subject, judicial deference to agency interpretation of agency rules effects the combination of law making (in the form of so-called "legislative" rules[5]) with law interpretation by requiring courts to accept agency interpretations of their own ambiguous regulations. Manning, *supra*, at 631. *Accord* Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & Liberty 475, 513 (2016) ("Because interpretation may work a significant change, the agency's power to interpret—subject only to deferential review—is akin to the power to rewrite the rule. [¶] This [is a] violation of the separation between lawmaking and law elaboration . . . ."). Among the drawbacks of this

---

[4] The desirability of separating law making from law interpretation has a long as well as distinguished pedigree. D.E.C. Yale, *Iudex in Propria Causa: An Historical Excursus*, 33 Cambridge L.J. 80, 86 (1974) (the principle that the manorial court and not the lord himself should render judgment "was a powerful one in the Middle Ages.").

[5] "Legislative rules are those that have the force and effect of law. From the perspective of agency personnel, regulated parties, and courts, these rules have a status akin to that of a statute." Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 476-77 (2002).

practice is the elimination of "an important incentive for adopting transparent and self-limiting rules"—presumably the very rules that would most safeguard individual liberty—"because any discretion created by imprecise, vague, or ambiguous laws inures to the very entity that created it." Manning, *supra*, at 648.

By violating the separation of powers, *Auer* deference also raises a self-dealing concern. One famous (if homely) explanation of the separation of powers is the image of a matron slicing a cake: "when considering the sharing of a cake between parties, the person who divides the cake must not be the person who chooses the desired piece of cake if there is to be a fair sharing." Michael P. Healy, *The Past, Present and Future of* Auer *Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. Kan. L. Rev. 633, 681 (2014) (citing James Harrington, *The Commonwealth of Oceana* (1656), *reprinted in* Cambridge Texts in the History of Political Thought 22, 24 (James G. Pocock ed., 1992)). Just as in a just system of home economics, so in a just administrative state: the entity making the rules should have no power to employ them in a way prejudicially beneficial to itself. Healy, *supra*, at 681 ("[A]bandoning *Auer* deference forecloses an agency from being able to make law (divide the cake) in a way that the agency itself can later apply unfairly (distributing the pieces).").

Rejecting *Auer* deference because of its inconsistency with the separation of powers does not mean that the allocation of law-making and law-interpretation to the same entity is never without some benefit. *See* Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122

Yale L.J. 384, 420 (2012) ("[T]he impartiality of decisionmakers [is] one institutional good among others, to be pursued, or not, as a larger calculus of institutional optimization suggests."); Jason Marisam, *Constitutional Self-Interpretation*, 75 Ohio St. L.J. 293, 308 (2014) ("[T]he anti-self-interpretation norm trades off against competing institutional values, and self-interpretation often exists when these competing considerations plausibly outweigh the risks from self-interpretation."). But in light of the depth and breadth of the power that federal agencies wield, the costs to fairness and the rule of law—and thus to liberty—that necessarily result from combining law-making and law-interpretation in the administrative state decisively outweigh any efficiency or other gains to be derived from their conflation. *See infra* Part III. *See also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment) (*Auer* deference "allows the agency to control the extent of its notice-and-comment-free domain."); Manning, *supra*, at 618 ("By providing the agency an incentive to promulgate imprecise and vague rules, [*Auer* deference] undercuts important deliberative process objectives . . . , and it creates potential problems of inadequate notice and arbitrariness in the enforcement of agency rules."). *Cf.* Kevin O. Leske, *A Rock Unturned: Justice Scalia's (Unfinished) Crusade Against the Seminole Rock Deference Doctrine*, 69 Admin. L. Rev. 1, 42 (2017) (reform of the current standard for deferring to agency interpretation of agency rules "would lead to positive results in our administrative state, such as increased consistency, uniformity, fairness and transparency").

Ultimately, however, any purported practical justification for *Auer* deference is beside the point. For even if the gains from *Auer* deference were significant, "beneficial effect cannot justify a rule that not only has no principled basis but contravenes [the] separation of powers." *Decker*, 568 U.S. at 621 (Scalia, J., concurring in part and dissenting in part). *See* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 12 (1996) (*Auer* deference "is a statist anachronism" and "should have no place in a system of limited government under the rule of law"). As "a dangerous permission slip for the arrogation of power," *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part), *Auer* deference frustrates the liberty-protecting aim of the separation of powers. For that reason alone, it should be abrogated.

II

AUER TOWN—NO LEGISLATORS HEEDED

A. *Auer* Is Particularly Egregious Since It Applies to Rules Even Where Agencies Violate Their Rulemaking Duties Under the Congressional Review Act

Auer deference violates separation-of-powers principles because it allows executive branch rules to avoid meaningful review by the judicial branch. This core problem with *Auer* deference is compounded by the fact that, in many cases, the very interpretation to which the judicial branch defers has also evaded statutorily mandated review by the *legislative* branch. The "interpretations" that *Auer* deference forces courts to accept are frequently issued without notice-

and-comment rulemaking procedures *and* without congressional review, the latter in violation of the Congressional Review Act. This is yet another reason why *Auer* deference must be eliminated and the outsized influence of these guidance documents must be curtailed. When documents so frequently slip through the cracks of meaningful oversight, courts should give these documents *less* authority, not more.

In 1996, Congress passed the Congressional Review Act (CRA). 5 U.S.C. § 801, *et seq.* The CRA was intended to "allow[] Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects." 142 Cong. Rec. S3683 (daily ed. Apr. 18, 1996) (joint, bipartisan statement of Senate sponsors Nickles, Reid, and Stevens); 142 Cong. Rec. E575 (daily ed. Apr. 19, 1996) (identical statement by Rep. Hyde for House CRA sponsors). To that end, the CRA requires every agency issuing a rule to submit it along with a short report to the House, Senate, and Government Accountability Office (GAO) "before [the] rule can take effect." 5 U.S.C. § 801(a)(1)(A). Once a rule has been submitted, Congress may pass a joint resolution of disapproval through a streamlined legislative process. *See id.* § 802. Such a joint resolution invalidates the rule and prevents the agency from issuing a "substantially similar" one in the future. *Id.* § 801(b).

The definition of a "rule" that must be submitted to Congress is intentionally broad. *See* 5 U.S.C. § 804(c) (adopting, with limited exceptions, the definition of a "rule" appearing in 5 U.S.C. § 551); 5 U.S.C. § 551(4) (defining a "rule" in part as an "agency statement . . . designed to implement, interpret, or prescribe law or policy"); *see also* 142 Cong. Rec. S3687 (daily ed. Apr.

18, 1996) ("Documents covered . . . include statements of general policy, interpretations of general applicability, and administrative staff manuals and instructions to staff that affect a member of the public."). The legislative sponsors of the CRA expressly chose this broad definition to address the agency practice of evading notice-and-comment procedures through the use of "guidance documents" and other more informal correspondence not published in the *Federal Register*.[6] Thus, a major purpose of the CRA was to require that such "regulatory dark matter" be submitted to Congress.

Since the passage of the CRA, study after study has confirmed that the executive branch has repeatedly failed to send many rules to the GAO to begin the congressional review process. *See, e.g.*, Cong. Research Serv., R40997, *Congressional Review Act: Rules Not Submitted to GAO and Congress* (2009),

---

[6] *See* 142 Cong. Rec. S3687 (daily ed. Apr. 18, 1996) (joint, bipartisan statement of Senate sponsors Nickles, Reid, and Steven) and 142 Cong. Rec. E578 (daily ed. Apr. 19, 1996) (identical statement by Rep. Henry Hyde for House sponsors) (emphasis supplied):

> The authors intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review. * * * These include guidance documents and the like. * * * *The authors are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The authors admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.*

https://www.redtaperollback.com/wp-content/uploads/2017/04/CRS122909.pdf; U.S. Gov't Accountability Office, *Federal Rulemaking: Perspectives on 10 Years of Congressional Review Act Implementation*, GAO-06-601T (2006), http://www.gao.gov/assets/120/113245.pdf; Curtis W. Copeland, *Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress* (2014), https://www.redtaperollback.com/wp-content/uploads/2017/05/CurtisCopelandCongressionalReviewActManyRecentFinalRulesWereNotSubmittedtoGAOandCongress07-15-2014.pdf. And while most of these studies have focused on rules published in the *Federal Register*, since they can be cross checked in public databases, the compliance rate for rules *not* published in the *Federal Register*, such as guidance documents, is much worse, though harder to quantify accurately. *See, e.g.*, Susan E. Dudley, *CRAzy After All These Years: Extending the Reach of the Congressional Review Act*, Forbes (Mar. 7, 2017), https://www.forbes.com/sites/susandudley/2017/03/07/crazy-after-all-these-years-extending-the-reach-of-the-congressional-review-act/#2c52e00d24b8 (noting that "thousands" of guidance documents have likely never been submitted to Congress).

It's impossible to know whether Congress would disapprove agency guidance documents at the same rate as notice-and-comment rules if the former were properly delivered for review. But when GAO opined that a Consumer Financial Protection Bureau guidance bulletin concerning discretionary pricing and indirect auto lending should have been submitted to Congress, both Houses deemed it submitted as of the date of the GAO opinion and subsequently disapproved it using the CRA procedures. President Trump signed the disapproval resolution on May 21,

2018, Pub. L. No. 115-172, which also prohibits the Consumer Financial Protection Bureau from issuing a substantially similar guidance document again without congressional authorization. *See* Alan S. Kaplinsky & Christopher J. Willis, *Congress disapproves CFPB Bulletin concerning discretionary pricing by auto dealers*, Consumer Finance Monitor (May 8, 2018), https://www.consumerfinancemonitor.com/2018/05/08/congress-disapproves-cfpb-bulletin-concerning-discretionary-pricing-by-auto-dealers/.

While the executive branch has wrongfully evaded congressional review of the vast majority of its guidance documents, the *Auer* doctrine has continued to give outsized importance to these very same informal writings. As several cases have demonstrated, the current regime of *Auer* deference has turned these documents into *de facto* amendments to the rules that agencies enact through notice-and-comment rulemaking, since courts are bound to follow any reasonable "interpretation" of a rule found in such a document.

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, for example, this Court gave determinative weight to an interpretation of an agency regulation contained in an internal EPA memorandum known as the "Regas Memorandum." 557 U.S. 261, 283-86 (2009). Because of the decisive weight given to agency interpretations under *Auer*, this single memo authored by a single EPA official effectively determined the EPA's policy regarding the regulations of "fill material" dredged up during mining. The memo at issue in *Coeur Alaska* was therefore undeniably an "interpretation[] of general applicability," just as much as any notice-and-

comment rule implementing a statute. Yet the memorandum in question had never been submitted to Congress for review, in violation of the CRA. *See* U.S. Gov't Accountability Office, https://www.gao.gov/legal/other-legal-work/congressonal-review-act?fedRuleSearch=regas&report=&agency=All&type=All&priority=All&begin_date=mm%2Fdd%2Fyyyy&end_date=01%2F21%2F2019&begin_eff_date=mm%2Fdd%2Fyyyy&end_eff_date=12%2F31%2F2020&begin_gao_date=mm%2Fdd%2Fyyyy&end_gao_date=01%2F21%2F2019&searched=1&Submit=Search#database (search in GAO database of submitted rules for "Regas" returns zero results).

Similarly in *G.G. ex rel. Grimm v. Gloucester County School Bd.*, the Fourth Circuit based its decision on the application of Title IX regulations to transgender bathroom usage on a single letter, 822 F.3d 709, 718 (4th Cir. 2016) *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem. op.), which was never submitted to Congress. *See* U.S. Gov't Accountability Office, https://www.gao.gov/legal/other-legal-work/congressional-review-act?fedRuleSearch=gender+identity&report=&agency=All&type=All&priority=All&begin_date=mm%2Fdd%2Fyyyy&end_date=01%2F22%2F2019&begin_eff_date=mm%2Fdd%2Fyyyy&end_eff_date=12%2F31%2F2020&begin_gao_date=mm%2Fdd%2Fyyyy&end_gao_date=01%2F22%2F2019&searched=1&Submit=Search#database (search in GAO database of submitted rules for "gender identity" returns six unrelated results). As these examples show, cases are regularly decided on the basis of *Auer* deference given to documents that have never been reviewed by Congress because the executive branch has illegally withheld them. The executive branch has thus failed to conform its procedures to acknowledge

the outsized influence and power that *Auer* deference gives to such memos.

In some cases, the internal tension in the executive's view of guidance documents has nearly reached a breaking point. In *Sackett v. EPA*, the Sacketts are challenging an EPA compliance order which asserts that their homesite is a federally protected wetland under the Clean Water Act. *See generally Sackett v. EPA*, 566 U.S. 120, 122 (2012). On remand to the district court, the case has been fully briefed on cross motions for summary judgment and awaiting decision for approximately three years. The sole issue in the Sacketts' challenge is whether their property contains navigable waters under the Clean Water Act. *See* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment on the Administrative Record at 13-24, *Sackett v. EPA*, No. 2:08-cv-00185-EJL (D. Idaho Sept. 4, 2015), ECF 103-1. A key basis on which the EPA defends its administrative determination that the Sacketts' property is a navigable water is the agency's 2008 post-*Rapanos* Guidance.[7] *See* United States' Combined Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of the United States' Cross-Motion for Summary Judgment at 7, *Sackett v. EPA*, No. 2:08-cv-00185-EJL (D. Idaho Nov. 20, 2015), ECF 105-1 (identifying and explaining the post-*Rapanos* Guidance as an interpretation of its regulation defining "adjacent" wetlands); *id.* at 9 (claiming *Auer* deference for interpretations of its regulations).

---

[7] *Available at* https://www.epa.gov/cwa-404/2008-rapanos-guidance-and-related-documents.

The post-*Rapanos* Guidance itself states that it "does not impose legally binding requirements on . . . the regulated community." Guidance at 4, n.17. And, the Guidance was never submitted to Congress for review under the Congressional Review Act. *See* Redtaperollback.com/rules (listing various agency guidance documents not submitted to Congress, in violation of the CRA); https://www.redtaperollback.com/rules/rapanos-guidance/ (post-*Rapanos* Guidance not submitted to Congress, in violation of the CRA). Despite failing to comply with the CRA's rulemaking requirements, and disclaiming any binding legal effect of the Guidance, EPA now argues to the federal courts that the Guidance demands judicial deference.

Because of *Auer* deference, the scope of documents that can effectively serve as binding amendment to agency policy is virtually limitless. For example, this Court has held that an agency interpretation is entitled to *Auer* deference even if it "is stated in a legal brief." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009). Likewise, even adjudicative decisions issued by quasi-judicial executive branch bodies are treated as agency interpretations for the purposes of *Auer*. The agency interpretation at issue in this case was written in the form of a decision by the Board of Veterans' Appeals. *See Kisor v. Shulkin*, 869 F.3d 1360, 1367 n.10 (Fed. Cir. 2017) ("The Board interpreted 38 C.F.R. § 3.156(c)(1) when it ruled that Mr. Kisor's service department records were not 'relevant' under that subsection. . . . Because the Board is part of the VA . . . the Board's interpretation of the regulation is deemed to be the agency's interpretation.") (citations omitted). When courts confer *Auer* deference to agency legal

interpretations of any form, including briefs and adjudicative decisions, those writings more clearly fall under the CRA's definition of a rule. Yet there is no evidence the executive branch has any intention of complying with the corresponding requirement to submit them to Congress under the CRA. It is a perverse outcome that the class of rules least often submitted for congressional review, and for that reason not lawfully effective under the CRA, should be accorded special deference in the courts.

To be clear, this case does not raise a legal challenge under the CRA. But the executive branch's longstanding evasion of the CRA's requirements provides evidence of the danger of giving judiciary-trumping authority to memos, letters, and even legal briefs. None of these documents are subject to notice-and-comment rulemaking, and there is no sign that the executive has any intention of granting Congress the opportunity to review these documents, even though that opportunity is required by law. This Court should do its part to rein in the proliferation of regulatory dark matter by overruling *Auer* and restore full judicial interpretation of the regulations these documents construe.

B. *Auer* Extends the Already Dubious Allowance for Delegation of the Legislative Power to the Executive

All of the various agency deference doctrines that this Court has promulgated have come under heavy fire for delegating legislative power to the executive. *Chevron* deference, for example, "risks trampling the constitutional design by affording executive agencies license to overrule a judicial

declaration of the law's meaning prospectively, just as legislation might—and all without the inconvenience of having to engage the legislative processes the Constitution prescribes." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). But *Auer* is a particularly dangerous form of deference because it allows one single branch of government to act as legislature, enforcer, and interpreter. For all of its flaws, under *Chevron* deference an agency has engaged in the interpretation of an act of Congress, which means that the law has received at least one round of interpretation by a branch of government that is distinct from the one that promulgated it before it comes before the judiciary. *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part and dissenting in part) ("Congress cannot enlarge its own power through *Chevron*—whatever it leaves vague in the statute will be worked out *by someone else*."). *See also* Manning, *supra*, at 639. On the other hand, with *Auer* deference, the same branch of government that has promulgated a rule is also given the ability to interpret and reinterpret its own rules with binding effect: "[a] form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people." *Gutierrez-Brizuela*, 834 F.3d at 1151. And since agencies "can also play a large role in the drafting and vetting of legislation, even before it is enacted . . . they will at times have three bites at the law-making apple." *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring) (citing Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. (2017), *available at* https://ssrn.com/abstract =2826146 (presenting the results of extensive interviews and surveys with 20 federal agencies)).

The impact of this delegation of legislative authority to the executive is as predictable as it is problematic. "*Auer* deference further accentuates the shift of power to the executive branch by encouraging agencies to promulgate regulations vague enough to allow administrators wide latitude in deciding how to govern." *Egan*, 851 F.3d at 280 (Jordan, J., concurring). Agencies are thus prone to "write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring). *See* Chris Walker, Auer *Deference Inside the Regulatory State: Some Preliminary Findings*, Notice & Comment: (Sept. 14, 2016), http://yalejreg.com/nc/auer-deference-inside-the-regulatory-state-some-preliminary-findings/ (discussing results of a survey of executive lawmakers that showed that 39% took *Auer/Seminole Rock* deference into account when drafting rules); Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703, 716 (2014) (same).

Because *Auer* places the power to create and interpret the law into a single hand, it incentivizes government gamesmanship and efforts "to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice." *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). While this Court has placed some theoretical limits on an agency's ability to reinterpret regulations when they are a "convenient litigating position" or a "post hoc rationalization[]," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), in practice these limits have done little to curtail agency aggrandizement of power. *See*,

e.g., Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp., York Cty., Pa., Located on Tax ID #440002800150000000 Owned by Brown, 768 F.3d 300, 316-17 (3d Cir. 2014) (Jordan, J., dissenting) (rejecting an agency's regulatory interpretation that the agency admitted was "at odds with . . . the common understanding" of the terms of the regulation and that was adopted in a footnote "in the middle of an unrelated rulemaking" as a "reaction to the District Court's decision in [that] case"). As long as *Auer* continues to place the power to legislate and to interpret into the same hands, the tendency to use and abuse that authority will continue untrammeled.[8]

III

AUER TOWN—NO JUDGES WELCOME

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. It is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Auer* deference "pushe[s] [the judiciary] further and further away from [its] constitutional responsibility to 'say what the law is,'" *Egan*, 851 F.3d at 278, and in doing so "undermines [the court's] obligation to provide a

---

[8] Deference to executive agency rulemaking interpretation also "tends to the permanent expansion of the administrative state" by serving as a "veto gate[]" that precludes "any legislative effort to curtail agency overreach." *Egan*, 851 F.3d at 280 (Jordan, J., concurring) (citing Randy R. Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* 212 (2016)).

judicial check on the other branches." *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring). As Alexander Hamilton explained in Federalist No. 78, "[t]he interpretation of the law is the proper and peculiar province of the courts." The separation of the judicial power from the legislative and executive powers is one of the key elements of our Constitution, and it functions as an important safeguard to the protection of individual liberty. *Bond v. United States*, 564 U.S. 211, 222 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by separation of powers protect the individual as well.").

Auer undermines the judiciary in two significant respects: First of all, "[i]t represents a transfer of judicial power to the Executive Branch." Second, "it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring).

As heirs of the legacy of the English Civil War, the Founders were keenly aware of the danger to liberty that an executive branch empowered to both interpret and enforce the law would create. *Perez*, 135 S. Ct. at 1215 (Thomas, J., concurring). The much reviled Star Chamber provided the British monarchy with the authority to conduct extrajudicial adjudication without due process of law. Philip Hamburger, *Is Administrative Law Unlawful?* 135 (2014). At the dawn of the English Civil War, Parliament abolished Star Chamber and other prerogative courts and declared that legal disputes would "have their proper remedy and redress . . . by

the common law of the land and in the ordinary course of justice." *Id.* at 138. In reliance on that legacy, the U.S. Constitution vests "[t]he judicial Power of the United States" in the Article III judiciary. The Constitution protected due process of law by ensuring "that government could bind subjects in particular instances only through the traditional processes of law, consisting of regular criminal or civil proceedings." *Id.* at 173. The guarantee that administrative actions would not be binding without full, meaningful, and independent judicial review was thus at the center of the Constitution's protections. *Auer* deference flaunts this constitutional guarantee by placing the power to legislate, enforce, and issue binding interpretation into the hands of one single branch of government. *See* The Federalist No. 48 (James Madison). "It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."

The federal judiciary was carefully designed to provide an independent source of legal interpretation and adjudication free from "pressure from the political branches, the public, or other interested parties." *Perez*, 135 S. Ct. at 1218 (Thomas, J., concurring). Significantly, Article III judges were given lifetime tenure upon good behavior to insulate them from pressure to conform their opinions. In contrast, members of the legislative or executive branch are subject to democratic pressure and "may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law." *Id.* at 1219. Article III judges thus provide a vital check on the tendency to overreach or abandon the Constitution and the rule of law by vigorously interpreting and applying the

law. *See Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring) ("[T]o resolve cases and controversies over past events calls for neutral decisionmakers who will apply the law as it is, not as they wish it to be."). *Auer* improperly forces the judiciary to "abandon the judicial check," *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring) by allowing executive agencies the power to both enact regulations with "the force and effect of law," *id.* at 1219, and to interpret what those regulations mean—both as applied to specific cases via adjudication and more generally through the issuance of guidance documents and similar actions.

Supporters of *Auer* argue that providing deference does not undermine judicial authority because ultimately the courts are free to reject an agency's interpretation as unreasonable and to offer their own binding interpretations. But as Justice Scalia explained in *Perez*, this form of review is ultimately inadequate. Agencies are given wide range to interpret increasingly vague interpretations, and therefore are able "to make binding rules unhampered by notice-and-comment procedure" or meaningful judicial scrutiny. *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring). *Auer*'s requirement of "binding deference" is in deep tension with the independence of the judiciary and thus contrary to the structure of power established by the Constitution. Manning, *supra*, at 621. Empirical evidence shows that the employment of *Auer* has a significant impact on the degree to which courts uphold agency action William Yeatman, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L.J. 515, 519 (2018) (showing that agency action is upheld 74% of the time under *Auer* compared to 58% under *Skidmore*).

Auer further undermines the role of the judiciary by granting executive agencies the power to overturn judicial judgments concerning the meaning of legislation or executive rulemaking. Under *Brand X*, agencies are entitled to deference even in the face of judicial precedent to the contrary. *See also Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring) ("By *Brand X*'s own telling, this means a judicial declaration of the law's meaning in a case or controversy before it is not 'authoritative,' . . . but is instead subject to revision by a politically accountable branch of government."). Judicial pronouncements are thus transformed into little more than advisory opinions in contravention of Article III.

Another inadequate justification for *Auer* is that agencies are "in a better position . . . to reconstruct the purpose of particular regulations" than the judiciary. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 145 (1991). This rationale conflates the agency's power to rulemake, a legislative function delegated to the agency by congress, and the judiciary's power to provide binding legal interpretation, squarely a judicial function. *Decker*, 568 U.S. at 618 (Scalia, J., concurring in part and dissenting in part) ("Making regulatory programs effective is the purpose of *rulemaking*, in which the agency uses its 'special expertise' to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule—to 'say what the law is[.]'"). While agencies may be experts in promulgating and enforcing regulatory policy, they are not experts at statutory interpretation, the provenance of the judiciary. *See Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 379 P.3d 1270, 1275 (Utah 2016) (rejecting *Auer* deference for state agencies and emphasizing

that "[w]e are in as good a position as the agency to interpret the text of a regulation that carries the force of law. In fact, we may be in a better position"). Furthermore, *Auer* has been extended to agency interpretation of rules that other agencies have promulgated, where the "interpreting" agency would be in no better position to "reconstruct" the purpose of the regulation than the judiciary. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696–99 (1991).

By predicating application on a threshold determination of "ambiguity," deference canons also introduce personal bias and inconsistency into the judicial process. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2139 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)). Canons of deference stymie the development and deployment of "neutral and impartial . . . interpretive rules" of construction. *Id.* at 2121.

In all of these respects, *Seminole Rock* and *Auer* impair the functioning of the judiciary and place binding judicial power in the hands of the executive branch.

CONCLUSION

For the foregoing reasons, this Court should abandon *Auer* deference.

DATED: January, 2019.

Respectfully submitted,

TODD F. GAZIANO
THOMAS A. BERRY
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
(202) 888-6881

ANTHONY L. FRANÇOIS*
*Counsel of Record
DAMIEN M. SCHIFF
DANIEL M. ORTNER
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
(916) 419-7111
TFrancois@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation, Chantell and Michael Sackett, and Duarte Nursery, Inc.

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,
Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs
Respondent.

On Writ Of Certiorari
To The Court of Appeals For The Federal Circuit

BRIEF OF PROFESSORS OF ADMINISTRATIVE LAW AND FEDERAL REGULATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

SAMUEL ESTREICHER
NYU SCHOOL OF LAW
40 Washington Sq. So.
New York, NY 10012
(212) 998-6226

DAVID L. NOLL
RUTGERS LAW SCHOOL
123 Washington St., 303C
Newark, NJ 07102

VINCENT LEVY
Counsel of Record
DANIEL M. SULLIVAN
GREGORY DUBINSKY
EVAN H. STEIN
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
vlevy@hsgllp.com

Counsel for Amici Curiae

January 31, 2019

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. *Chevron* And *Auer* Are Fundamentally Distinct Doctrines Designed To Address Different Legal Questions 3

II. *Chevron* And *Auer* Do Not Raise The Same Statutory And Constitutional Questions 7

III. *Chevron* And *Auer* Have Different Historical Pedigrees And Implicate Different *Stare Decisis* Considerations 11

CONCLUSION 13

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Auer v. *Robbins*,
519 U.S. 452 (1997) ..... *passim*

Bowles v. *Seminole Rock & Sand Co.*,
325 U.S. 410 (1945) ..... *passim*

Chevron U.S.A. Inc. v.
Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) ..... *passim*

Christensen v. *Harris County*,
529 U.S. 576 (2000) 8, 9

Decker v. *Nw. Envtl. Def. Ctr.*,
568 U.S. 597 (2013) 7, 10

Garco Constr., Inc. v. *Speer*,
138 S. Ct. 1052 (2018) 8

J.W. Hampton, Jr., & Co. v. *United States*,
276 U.S. 394 (1928) 9

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 5, 10

Perez v. *Mortgage Bankers Ass'n*,
135 S. Ct. 1199 (2015) 8, 12

Skidmore v. *Swift & Co.*,
323 U.S. 134 (1944) 5, 7

United States v. *Mead Corp.*,
533 U.S. 218 (2001) 3, 4, 12

Whitman v. *Am. Trucking Ass'ns*,
531 U.S. 457 (2001) 9

Yakus v. *United States*,
321 U.S. 414 (1944) 3, 9

OTHER AUTHORITIES

Henry P. Monaghan, Marbury *and the Administrative State*,
83 Colum. L. Rev. 1 (1983) 5, 12

Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*,
115 Yale L.J. 1256 (2006) 11

Peter L. Strauss, *"Deference" Is Too Confusing-Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"*
112 Colum. L. Rev. 1143 (2012) 4, 5

Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock,
65 Emory L.J. 47 (2015) 6

INTEREST OF AMICI CURIAE[1]

Amici are professors of law who teach and write in the fields of administrative law and federal regulation. They have an interest in how the Court's decision will affect administrative law. *Amici* have different views as to whether *Auer* and *Seminole Rock* were correctly decided. Some of the *Amici* believe these cases were correct, and others believe they were not. All *Amici* believe, however, that the deference regimes prescribed by *Auer/Seminole Rock*, on the one hand, and *Chevron*, on the other, rest on wholly different foundations. Further, *Amici* submit that, regardless of whether *Auer* and *Seminole Rock* are overruled or narrowed, *Chevron* is, and should remain, good law. A complete list of *Amici* is provided in Appendix A.

SUMMARY OF THE ARGUMENT

In this case, the Court considers whether to overrule *Auer* v. *Robbins*, 519 U.S. 452 (1997), and its antecedent, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). That line of cases involves a particular form of deference to agency action—specifically, deference to an agency's interpretation of its own regulation. In seeking certiorari, however, Petitioner argued that "[r]evisiting *Auer* deference [would be] an appropriate place to begin" a more complete "reconsideration" of "existing doctrines of agency deference," including under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. 11.

---

[1] Respondent has filed blanket consent to the filing of *amicus* briefs, and Petitioner, who was notified of our intent to file this brief, consented to its filing. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

Amici do not address whether *Auer* should be overruled. Rather, *Amici* respectfully submit that, in considering the continuing viability of *Auer*, the Court should not lose sight of the fact that *Auer* and *Seminole Rock* rest on very different conceptual and legal foundations than does *Chevron*. Furthermore, *Chevron*, properly understood, does not implicate the separation-of-powers questions Petitioner raises about *Auer*, and it rests on a different historical pedigree than *Auer*. Reconsidering *Auer* is not, and should not be, a "first step" to reconsidering *Chevron*. The two doctrines are fundamentally distinct, and *Chevron* deference remains appropriate even if *Auer* deference to an agency's interpretation of its own regulations is reconsidered. Indeed, after having petitioned the Court on the notion that it would be wise to revisit all deference doctrines, Petitioner in its merits brief now seems to acknowledge that the two doctrines are indeed distinct, asserting that "*Chevron* deference confirms the flaws of *Auer* deference." Brief for Petitioner 45–47.

Indeed, it would be a mistake to lay at *Chevron*'s door whatever problems the Court may have with *Auer*. The *Chevron* line of cases acknowledges that Congress, in crafting complex regulatory statutes, may lawfully create a statutory "space" within which an agency may promulgate binding policy via statutorily prescribed procedures. By contrast, *Auer* addresses the deference owed to an agency's interpretation of its own ambiguous regulations. Put another way, *Chevron* is about Congress's delegation of subsidiary policymaking authority, whereas *Auer* is about how best to interpret a legal instrument—the agency's regulation. *Auer* therefore has nothing to say on the matter *Chevron* addresses.

ARGUMENT

I. *Chevron* And *Auer* Are Fundamentally Distinct Doctrines Designed To Address Different Legal Questions.

A. In *Chevron*, this Court explained the rationale for deferring to a properly promulgated agency regulation: Congress "left a gap for the agency to fill," and there is an "express" or "implicit" delegation of authority to the agency "to elucidate a specific provision of the statute by regulation." 467 U.S. at 843–44. Synthesizing the doctrine further in *United States* v. *Mead Corp.*, the Court explained that *Chevron* deference is triggered only if it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." 533 U.S. 218, 229 (2001). The *Chevron* principle thus recognizes that in appropriate cases Congress may task an agency with "the formulation of subsidiary administrative policy within the prescribed statutory framework." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944).

The specific administrative-law question the *Chevron* doctrine addresses is this: When an agency promulgates a regulation (or issues an order) interpreting a statute it is charged with administering pursuant to an express or implicit delegation from Congress, has the agency stayed within the bounds Congress set, or has the agency strayed beyond congressionally prescribed limits? Deference is due only if, and precisely because, the Court concludes that Congress left space for the agency to promulgate binding policy and the agency's determination is not unreason-

able. See Peter L. Strauss, *"Deference" Is Too Confusing-Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 Colum. L. Rev. 1143, 1145 (2012) (*"'Chevron* space' denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority.").

It is only upon verifying that Congress has made such an allocation—and that the agency has followed required procedures and acted reasonably—that the Court has deferred to the agency's determination. Consider *Chevron* itself, which evaluated an EPA regulation defining the statutory term "stationary source." 467 U.S. at 842. The Court concluded that because Congress had not "commanded" a single definition of what constituted an emitting source, the agency was empowered to make a binding policy decision (*i.e.*, whether to adopt a plant-wide definition) in the interstices of the statute. *Ibid.* Deference was due because the statute left space for the agency's "subsidiary administrative policy" determination. See *ibid.* In *Mead*, by contrast, the Court declined to apply *Chevron* deference to a tariff classification ruling by the United States Customs Service because Congress had not "intended such a ruling to carry the force of law." 533 U.S. at 221.

Those results and the underlying reasoning are sound. If there has been a delegation of policymaking authority to an agency, this Court has correctly held, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue

and the agency's interpretation is reasonable." *Id.* at 229 (citations omitted). This is simply another way of saying that, in this circumstance, the judicial function of declaring "what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is limited to ascertaining whether the agency has strayed beyond the scope of the delegation set by Congress. See Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 26 (1983) ("Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law-making authority to an agency." (emphasis omitted)); Strauss, *supra*, at 1145 ("Courts are, of course, ultimately responsible for deciding questions of law, but one such question is: 'How much authority has validly been allocated to this agency?'").

On the other hand, if there has been *no* delegation of policymaking authority to the agency, then it follows that there is no basis for deference (beyond whatever respectful consideration of the agency's views is appropriate under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)). In that circumstance, the court's duty to "say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177, does not entail a duty to defer to the agency's interpretation of the statute, because the agency was not empowered to, and did not, make any pronouncement having legal force within a "space" reserved to the agency by Congress. Strauss, *supra*, at 1145.

The short of the matter is that *Chevron* deference faithfully fulfills the judicial task in administrative-law cases that implicate the meaning of an agency's organic statute. If a court determines that an agency has been given policymaking authority within certain bounds set by statute, including acting through the required procedures, then the only question for the court is whether the agency has stayed within the bounds

set by Congress. The court answers that question by determining whether the agency's course of conduct is consistent with the statute and otherwise reasonable. If, on the other hand, there has been no delegation of policymaking authority, then the court owes the agency no deference under *Chevron*.

B. *Auer* deference is designed to address an altogether different question and rests on an entirely different foundation. A court applying *Auer* deference does not address the *Chevron* question—whether the agency has acted within the scope of authority set by Congress. Rather, *Auer* deference is meant to assist the court in determining the meaning of a regulation promulgated by the agency when that regulation is deemed ambiguous.

In the *Auer* context, the agency is the creator of the regulation and thus presumably has familiarity with the practical issues the regulation is meant to address. In *Seminole Rock*, *Auer*'s antecedent case, the Court emphasized that, in discerning what the agency meant its regulation to accomplish, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414; see Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47 (2015).

Thus, the rationale for what later became *Auer* deference has nothing to do with determining the meaning of legislation, or with whether the agency has kept within the bounds of a statutory delegation. The question in the *Seminole Rock/Auer* context is simply whether an agency's interpretation of its own regulation is entitled to "controlling weight."

Amici will not trace the development of the doctrine from *Seminole Rock* to *Auer*—leaving that to the parties and their *amici*. Nor will *Amici* address the question whether, or in what circumstances, it is appropriate to give an agency interpretation of a regulation "controlling weight."[2] Suffice it to say, however, that "*Auer* is not a logical corollary to *Chevron*." *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part). Instead, the two doctrines are designed to address different administrative-law questions, and they rest on distinct legal and analytical foundations.

II. *Chevron* And *Auer* Do Not Raise The Same Statutory And Constitutional Questions.

Petitioner has suggested that this case should be the starting point for reexamining not just *Auer* and *Seminole Rock*, but also other deference doctrines, including *Chevron*. Pet. 11. *Amici* disagree that *Chevron* warrants reconsideration, or that these two deference doctrines have much, if anything, to do with one another as a conceptual matter. In any event, the charges that petitioner levels against *Auer* cannot be leveled against *Chevron*.

A. Citing several members of this Court, Petitioner argues that "*Auer* deference provides agencies an end-run around the notice-and-comment procedures," including by incentivizing agencies to speak

---

[2] Nonetheless, *Amici* believe that, if this Court overrules *Auer*, an agency's interpretation of its regulation should be evaluated by means of the factors set forth in *Skidmore*—"the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

ambiguously. Pet. 15 (citing *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J.); *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from denial of certiorari)); see also Brief for Petitioner 28–36, 37–40 (arguing that *Auer* is incompatible with the APA's notice-and-comment procedures, and the related jurisprudence on interpretive rules, and policy reasons behind both).

Whatever the merit of this attack upon *Auer*, the same charge cannot be levied at *Chevron*. Indeed, if anything, the incentives created by *Chevron* and *Auer* are opposite. Accord Brief for Petitioner 46 ("*Chevron* deference therefore promotes, rather than skirts, notice-and-comment rulemaking").

Indeed, this Court's decision in *Christensen* v. *Harris County* makes the distinction quite clear. 529 U.S. 576 (2000). There, the government argued that the Court should "defer to the Department of Labor's opinion letter" as to the meaning of the Fair Labor Standards Act and the meaning of a regulation promulgated by the Department of Labor. *Id.* at 586, 588. The Court declined to accord *Chevron* deference to "an interpretation" of the statute "contained in an opinion letter," distinguishing the letter from an agency interpretation "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." *Id.* at 587. "Interpretations" contained in documents "lack[ing] the force of law," the Court held, "do not warrant *Chevron*-style deference." *Ibid.* Agencies only receive *Chevron* deference if they follow statutorily prescribed procedures for making binding statements of subsidiary administrative policy—that is, statements that carry "the force of law." *Ibid.* Thus, *Chevron* gives agencies every incentive not to skirt those procedures.

By contrast, the Court declined to defer under *Auer* to the letter's interpretation of the regulation, but not because the agency's pronouncement lacked the force of law. Rather, since even agency texts that do not carry the force of law may receive *Auer* deference, the Court relied on its determination that "[t]he regulation" at issue was "not ambiguous." *Id.* at 588. Had the regulation at issue been ambiguous, then—and assuming the opinion letter's interpretation was not "plainly erroneous or inconsistent with the regulation," *Auer*, 519 U.S. at 461—*Auer* deference would have been appropriate. Thus, *Auer* permits deference to informal agency interpretations which, because of their informality, would not receive deference under *Chevron*.

B. Petitioner's next attack upon the *Auer* doctrine is that it violates the separation of powers. Brief for Petitioner 43–45. Without taking a view on whether *Auer* deference contravenes the separation of powers, *Chevron* deference, appropriately applied, plainly does not.

To begin, *Chevron* does not offend Article I of the Constitution. Article I, as reflected in the non-delegation doctrine, requires that "when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). If an organic statute meets that test, then there is no occasion to question on delegation grounds an exercise of agency authority under a properly drawn delegating statute. And the operation of *Chevron* itself is perfectly consistent with longstanding non-delegation doctrine. *Yakus*, 321 U.S. at 424 ("The

Constitution . . . does not require that Congress . . . make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.").

Nor does *Chevron* offend Article III's prescription that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. When a court concludes that Congress has delegated authority to an agency to make administrative policy within prescribed statutory limits, the court decides what those limits are and whether the agency has strayed beyond them. Cf. Brief for Petitioner 27 (asserting that *Auer* violates the APA's prescriptions relating to the judicial review of agency regulations).

Relatedly, Petitioner asserts that *Auer* deference should be revisited because it contravenes the "'fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.'" Brief for Petitioner 45 (quoting *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part)); see also Pet. 17–18 (same).

But for similar reasons, this attack makes no headway against *Chevron*. That is, *Chevron* addresses how to discern the meaning of a federal statute passed by Congress and signed by the President. And the Court is the body that decides the ultimate question under *Chevron*—whether the agency has stayed within its statutory limits. The Court performs that task by considering what the federal law provides, evaluating whether there has been a delegation of authority, and then, by reviewing what the agency has

done, deciding whether the agency acted within the scope of delegated authority. *Chevron* thus entails no erosion of the judicial function.

III. *Chevron* And *Auer* Have Different Historical Pedigrees And Implicate Different *Stare Decisis* Considerations.

We end with a note on *stare decisis*. Petitioner states that, in considering whether *Auer* should stand, the doctrine of *stare decisis* "applies with appreciably less force" and that "it is not clear that *stare decisis* applies at all in the context of 'deference regimes'" such as *Auer*. Brief for Petitioner 47, 49 (internal quotation marks and citation omitted); see generally *id.* 47–55. Again, *Amici* do not express a view on this point as applied to *Auer*. But they submit that the same claim cannot be made if *Chevron*'s continued viability is at stake.

A strong historical pedigree supports the concept underlying *Chevron*—that Congress may enact laws that set boundaries for agency action while permitting executive officers to fill the gaps. Several examples of what we would now call delegation can be seen in the earliest days of the Republic. For instance, the Postal Act of 1792 gave the Postmaster General broad discretion to determine "where to set up post offices," and "full authority to contract for the carriage of mail by whatever devices he thought 'most expedient.'" Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, 1787–1801, 115 Yale L.J. 1256, 1294 (2006); *ibid.* ("Congress made broad delegations of authority in a host of other statutes.").

The courts found nothing untoward. Instead, "[m]andamus and injunction actions seeking to review administrative interpretation of law in connection

with the denial of pensions, land grants, and other largess were frequently barred by the rule that these remedies reached only the violation of plain, nondiscretionary administrative duties." Monaghan, *supra*, at 16; see also *ibid.* ("History, if not logic, is thus squarely against the . . . assertion . . . that article III courts can never yield to administrative constructions of law."). Thus, while *Chevron* clarified the circumstances in which agencies may establish binding policy in recognition of the complexity of modern regulatory statutes, it followed longstanding practice.

The historical pedigrees of *Chevron* and *Auer* are quite distinct. See *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring) ("[T]he rule of *Chevron* . . . at least was in conformity with the long history of judicial review of executive action, where '[s]tatutory ambiguities . . . were left to reasonable resolution by the Executive.' I am unaware of any such history justifying deference to agency interpretations of its own regulations." (quoting *Mead*, 533 U.S. at 243 (Scalia, J., dissenting))).

Finally, it would be error to conclude that overturning *Chevron* would not significantly unsettle expectations. *Chevron* reflects the foundational notion that Congress may delegate certain tasks of subsidiary administrative policy to agencies. That is a principle of law that the public and Congress have long held to, and one that the Court should not lightly disturb.

CONCLUSION

The Court's ruling in this case should respect the fundamental differences between *Chevron* and *Auer* deference. *Chevron* deference, properly applied, is an important and structurally sound principle that should not, and need not, be placed in doubt if this Court overrules or modifies *Auer* deference.

Respectfully submitted,

SAMUEL ESTREICHER
NYU SCHOOL OF LAW
40 Washington Sq. So.
New York, NY 10012
(212) 998-6226

DAVID L. NOLL
RUTGERS LAW SCHOOL
123 Washington St., 303C
Newark, NJ 07102

VINCENT LEVY
Counsel of Record
DANIEL M. SULLIVAN
GREGORY DUBINSKY
EVAN H. STEIN
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
vlevy@hsgllp.com

Counsel for Amici Curiae

January 31, 2019

Appendix

APPENDIX*

Amici consist of the following professors:

1. William D. Araiza is Professor of Law at Brooklyn Law School. He teaches and writes extensively on administrative and constitutional law, and is the author of textbooks, articles, and academic monographs on these topics.

2. Michael Asimow is Visiting Professor of Law at Stanford Law School and UCLA School of Law, and a co-author of State and Federal Administrative Law (4th ed. 2014).

3. Marshall Breger is Professor of Law at Columbus School of Law, The Catholic University of America. A former Chair of the Administrative Conference of the United States and former Solicitor of Labor, he has taught administrative law for more than twenty-five years.

4. William W. Buzbee is a Professor of Law at Georgetown University Law Center. He teaches administrative law, legislation and regulation, and environmental law. Among his articles and books are Preemption Choice (2009 and 2011); Fighting Westway (2014) and Environmental Protection: Law and Policy (co-author of 5th through 8th editions).

---

* Institutional affiliations are noted only for the purpose of identification. This brief does not purport to represent the views of any person or institution other than *Amici*.

5. Bryan T. Camp is George H. Mahon Professor of Law at Texas Tech University School of Law. He teaches and writes in the areas of administrative law, civil procedure, and taxation. He is an elected member of the American Law Institute.

6. Samuel Estreicher is Dwight D. Opperman Professor of Law, Director of the Center for Labor and Employment Law, and Co-Director of the Institute of Judicial Administration at New York University School of Law, and a co-author of Legislation and the Regulatory State (2d ed. 2017).

7. William Funk is Lewis & Clark Distinguished Professor of Law, Emeritus at Lewis & Clark Law School. He is the author of American Constitutional Structure and a co-author of Administrative Procedure and Practice: Problems and Cases and the Federal Administrative Procedure Sourcebook.

8. Jerry L. Mashaw is Sterling Professor of Law Emeritus and Professorial Lecturer at Yale University, and three-time winner of the annual scholarship award of the ABA Section of Administrative Law and Regulatory Practice. His latest book, which contains a discussion of the democratic foundation for the *Chevron* doctrine, is Reasoned Administration and Democratic Legitimacy: How Administrative Law Supports American Democracy (2018).

9. Nina A. Mendelson is the Joseph L. Sax Collegiate Professor of Law at the University of Michigan Law School, where she teaches administrative law and statutory interpretation; she also serves as a senior fellow of the Administrative Conference of the United States.

10. Joel A. Mintz is Professor of Law Emeritus and C. William Trout Senior Fellow in Public Interest Law at Nova Southeastern University College of Law. He has taught courses related to regulation and administrative law for thirty-six years and is an elected member of the American Law Institute.

11. David L. Noll is Associate Professor of Law at Rutgers Law School. He teaches and writes in the areas of legislation, regulation, civil procedure, and complex litigation, and is a co-author of Legislation and the Regulatory State (2d. ed. 2017).

12. Richard Stewart is University Professor and John E. Sexton Professor of Law at NYU School of Law. He was formerly Byrne Professor of Administrative Law at Harvard Law School and Assistant Attorney General for Environment and Natural Resources in the United States Department of Justice.

13. Peter L. Strauss is Betts Professor of Law Emeritus at Columbia Law School, where he teaches administrative law, legal methods, and

legislation. Among his many writings on federal administrative law are Gellhorn and Byse's Administrative Law, Cases and Comments (12th ed. 2017) and Administrative Justice in the United States (3d ed. 2016).

14. Jeff Thaler is Visiting Associate Professor, Maine Law School. He is a long-time litigator of regulatory and agency issues, and has created and taught new courses in Maine on legislative and administrative law, as well as a unique skills-building course on administrative proceedings in a simulated development project.

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF NEITHER PARTY

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae Public Citizen, Inc.

January 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. This Court should not call into doubt the legitimacy of *Chevron* deference 3

II. An appropriately defined view of *Auer* and *Seminole Rock* comports with congressional intent and the judicial role. 9

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: **Page(s)**

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) ..... *passim*

Chevron, U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) ..... *passim*

City of Arlington v. FCC,
569 U.S. 290 (2013) 3, 4, 5, 8

Ehlert v. United States,
402 U.S. 99 (1971) 12

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016) 6, 13

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 13

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 5

Judulang v. Holder,
565 U.S. 42 (2011) 6

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,
463 U.S. 29 (1983) 6, 11, 12, 13

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 5, 7, 13

Pauley v. BethEnergy Mines, Inc.,
501 U.S. 680 (1991) 9

Perez v. Mortgage Bankers Ass'n,
135 S. Ct. 1199 (2015) 4, 10, 11

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 14

Smiley v. Citibank (S. Dak.), N.A.,
517 U.S. 735 (1996) 3

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 13

United States v. Mead Corp.,
533 U.S. 218 (2001) 5, 6, 13, 14

Statutes:

5 U.S.C. § 706 ..... 4, 7

5 U.S.C. § 706(2) 10, 14

5 U.S.C. § 706(2)(A) 2, 3, 6, 7

5 U.S.C. § 706(2)(D) 13

38 U.S.C. § 7292(d)(1) 14

Other:

Michael Herz, Chevron *is Dead: Long Live* Chevron,
115 Colum. L. Rev. 1867 (2015) 8

Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*,
46 Conn. L. Rev. 226 (2013) 12

Cass R. Sunstein & Adrian Vermeule,
The Unbearable Rightness of Auer,
84 U. Chi. L. Rev. 297 (2017) 10

William Yeatman, *Note: An Empirical Defense of Auer Step Zero*, 106 Geo. L.J. 515 (2018) 15

INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Much of Public Citizen's research and policy work focuses on regulatory matters, and Public Citizen is often involved in litigation both challenging and defending agency action. Frequently, those cases involve application of this Court's major doctrines concerning deference to agencies: *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), which provides for deference to an agency's exercise of rulemaking authority delegated by Congress, and *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which require deference to an agency's construction of its own regulations. The government often invokes both the *Chevron* doctrine and the *Auer/Seminole Rock* doctrine in defense of agency actions challenged by Public Citizen, as well as in defense of agency actions Public Citizen supports. Public Citizen's view of the doctrines therefore does not reflect a perception that they systematically favor or disfavor outcomes it supports or positions it takes in particular matters. The role these doctrines play in cases of significance to Public Citizen's mission gives Public Citizen a strong interest in their proper application and in the more fundamental question whether the Court should continue to adhere to them.

---

[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have consented in writing to its filing.

SUMMARY OF ARGUMENT

Both the *Chevron* doctrine and the *Auer/Seminole Rock* doctrine, at their cores, reflect application of the principle that the law commands that courts uphold reasonable exercises of authority delegated by Congress to administrative agencies. Public Citizen submits this brief in support of neither party to emphasize two points.

First, whatever the Court ultimately determines about whether to overrule *Auer* and/or *Seminole Rock*, the Court should not call into question *Chevron*'s deference to the lawful exercise of agency authority to fill gaps in regulatory schemes created by statute. Properly understood and applied, *Chevron* is fully consistent with the requirement that courts interpret statutes; *Chevron* commands deference only when a court has determined that what a statute *means* is that an agency has discretion to resolve a particular matter through regulations or other actions with the force of law. And where *Chevron* is triggered, its deferential standard implements—indeed, is commanded by—the APA's standard of review for discretionary agency action. *See* 5 U.S.C. § 706(2)(A).

Second, although the basis for *Auer* and *Seminole Rock* differs in some respects from that of *Chevron*, deference to an agency's interpretations of its own regulations likewise has a legitimate grounding in congressionally delegated authority. When an agency takes an action premised on a lawful construction of a regulation whose plain terms do not resolve the issue, the APA's deferential standard of review applies, and a court may set aside the agency's action only if it is arbitrary, capricious, or an abuse of discretion. 5

U.S.C. § 706(2)(A). The APA does not, however, command unqualified deference to an agency's regulatory construction, any more than it does to other exercises of discretion. Rather, like other actions subject to APA review, an agency's interpretation of one of its regulations must be set aside if lacks a proper, reasoned basis. Moreover, not every opinion an agency or its personnel express about a regulation, or every form in which such an opinion is expressed, reflects an agency action to which the APA standard of review applies—and thus to which *Seminole Rock* and *Auer* should apply. Nonetheless, the Court should not sweep away the deferential standard for review of an agency's construction of a regulation within the sphere properly addressed by *Auer* and *Seminole Rock*.

Public Citizen takes no position on the merits of the dispute between the parties over the proper interpretation of the regulation at issue here.

ARGUMENT

I. This Court should not call into doubt the legitimacy of *Chevron* deference.

In *City of Arlington v. FCC*, Justice Scalia explained, on behalf of a majority of this Court, that "*Chevron* is rooted in a background presumption of congressional intent." 569 U.S. 290, 296 (2013). Specifically, *Chevron* commands deference to an agency's construction of a statute if a court determines that, when Congress "'left ambiguity in a statute' administered by an agency, [it] 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *Id.* (quoting *Smiley v. Citibank (S. Dak.), N.A.*, 517 U.S. 735, 740–741 (1996)).

Chief Justice Roberts's dissent, while disagreeing with the majority opinion on the resolution of the particular issue posed in that case, also accepted the proposition that "[c]ourts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretative authority over the question at issue." *Id.* at 312 (Roberts, C.J., dissenting). Despite their differences, the *Arlington* majority and dissent were united in recognizing that *Chevron* applies only when a court determines that the statute's meaning is that the agency possesses discretionary authority, and the agency acts within the scope of that discretion. *See id.* at 306–07 (majority opinion).

Two years later, however, in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), Justice Scalia's opinion concurring in the judgment, in the course of critiquing *Auer* and *Seminole Rock*, suggested that *Chevron* was "[h]eedless of the original design of the APA," *id.* at 1211, because it transferred from the courts to agencies the power to "interpret ... statutory provisions." *Id.* (citing 5 U.S.C. § 706). Although suggesting that it might be too late in the day to abandon *Chevron*, *id.* at 1212, the opinion nonetheless intimated that *Chevron* as well as *Auer/Seminole Rock* was a "judge-made doctrine[] of deference" inconsistent with "the responsibility of the court to decide whether the law means what the agency says it means." *Id.* at 1211.

Chevron is not at issue in this case. Because, however, the Court's discussion of the arguments about *Auer/Seminole Rock* may have implications for *Chevron*, the Court should be clear in avoiding characterizations of the doctrines that suggest that *Chevron* may be illegitimate. Justice Scalia (together with all the

members of the Court) was correct in *Arlington* in recognizing that where *Chevron* properly applies, it is fully consistent with congressional intent and the judicial responsibility to determine the meaning of statutes. And, as the petitioner here acknowledges, "[w]hen the APA's procedural safeguards are respected, judicial deference to agency interpretations of ambiguous statutory text is consistent with the APA's structure and purpose." Pet. Br. 46.

In a *Chevron* case, a reviewing court does not abdicate its responsibility to interpret the statute. Rather, the court defers only after it determines that the *meaning* of the statute is that Congress has delegated authority to the agency to resolve a particular issue concerning the statute's scope or application. Deference under *Chevron* is triggered when a court finds a statutory "gap" or ambiguity with respect to a matter as to which Congress has conferred rulemaking authority to an agency—a gap that ordinary principles of statutory construction, beginning with the primacy of unambiguous statutory text, cannot resolve. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 446–49 (1987). The identification of such a gap reflects a determination that the statute itself does not reflect a specific intent concerning how the agency should resolve that matter. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Rather, the terms of the statute embody an intent that the *agency* resolve the matter within the bounds set by the statute and the agency's obligation to engage in rational decisionmaking in conformity with applicable procedures. *See id.*; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

Chevron is a case in point. The statute at issue there required the agency to regulate air emissions

from "stationary sources," but the statute did not express a discernible intent as to how that term should be applied to a single facility with multiple smokestacks. 467 U.S. at 845. In light of the statute's delegation of regulatory power to the agency, the Court held that what the statute meant was that the agency had discretion to determine the bounds of a stationary source, just as it had discretion with respect to other matters under the statute, such as determining the emissions limits necessary to protect public health. *See id.* at 843–45, 865–66.

Where Congress has lawfully delegated such authority, and the agency has exercised it through the procedures required by Congress—typically, through rulemaking, *see Mead Corp.*, 533 U.S. at 230—the APA provides for deferential review: The agency action is to be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Chevron*, 467 U.S. at 843. The standard is equally applicable whether the matter delegated to the agency is filling a gap in the statute by explicating ambiguous statutory terms (*Chevron*'s domain), or exercising some other form of delegated discretion, such as determining whether a motor vehicle safety standard is "reasonable, practicable, and appropriate." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 33 (1983). The "reasonableness" review a court exercises at "*Chevron* step two" is thus, properly understood, an application of APA review of the exercise of agency discretion. *See Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (applying *State Farm* standard to an agency's construction of a statute);

Brand X, 545 U.S. at 981 (explaining that interpretations entitled to *Chevron* deference are subject to review to determine whether they are "arbitrary and capricious ... under the Administrative Procedure Act").

Accordingly, a reviewing court applying the *Chevron* framework fully complies with its obligation to "decide all relevant questions of law [and] interpret constitutional and statutory provisions." 5 U.S.C. § 706. It does so, first, by interpreting the statute and deferring only upon a determination that what the statute means is that Congress delegated authority to the agency on the point at issue. *Chevron* thus explicitly honors the principle that "[t]he judiciary is the final authority on issues of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Second, the court enforces the requirements of the APA, as well as the constraints that the authorizing statute places upon the agency's exercise of its discretionary authority, by considering at *Chevron* step two whether the agency's construction must be set aside as "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

In addition, even where a statute contains a gap or ambiguity providing the agency a range of discretion, it may still unambiguously rule out some purported exercises of that discretion, rendering them "not in accordance with law," in the terms of section 706(2)(A). For example, although the statute at issue in *Chevron* was ambiguous with respect to the scope of a "stationary source," and the rule at issue reflected a reasonable resolution of that ambiguity, the statute surely would have unambiguously ruled out a regulation that purported to define a facility located in New York as being within the same "stationary source" as a facility in Los Angeles. Whether such a regulation would be viewed as failing at *Chevron* step one or step two, it

would doubtless be held unlawful. As Justice Scalia put it in *Arlington*, even "where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." 569 U.S. at 307. *Chevron* fully vindicates judicial authority to police the bounds of agency authority by "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *Id.*

This understanding of *Chevron*, which hews closely to the *Chevron* decision itself, avoids "an abandonment of the judicial role, while still granting due weight to agency interpretation and, within the congressionally established and judicially policed *Chevron* space, respecting agency construction." Michael Herz, Chevron *is Dead: Long Live* Chevron, 115 Colum. L. Rev. 1867, 1909 (2015).

> So understood, *Chevron* is not a revolutionary shift of authority from the judiciary to the executive. That *Chevron* is dead. Rather, *Chevron* is an appropriate allocation of decisionmaking responsibility among the three branches, relying on the judiciary to enforce congressional decisions, but protecting agency authority and discretion where Congress has left the decision to the executive. Long may it reign.

Id. This Court should suggest nothing to the contrary in this case.

II. An appropriately defined view of *Auer* and *Seminole Rock* comports with congressional intent and the judicial role.

In this case, an agency exercising congressionally delegated authority to take a specific action (namely, determine a veteran's entitlement to disability benefits) has based that action on its construction of a regulation that the court below held does not supply an unambiguous rule of decision.[2] This Court's precedents providing for deference to such decisions—the *Auer/Seminole Rock* doctrine—are consistent with congressional intent reflected in statutes that confer substantive authority on agencies and in the APA's deferential standard of review of actions reflecting congressionally delegated discretion.

Deference to an agency's reasonable construction of a regulation whose application to particular circumstances is ambiguous is grounded in the inference that, in delegating an agency authority to implement a regulatory scheme, Congress also delegated authority to construe rules reasonably in instances where their application may not be clear. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991). When an agency bases an action that Congress has authorized it to take on its construction of a regulation, its action should be entitled, under the APA, to the same degree

---

[2] The government argued in its brief in opposition that the agency's construction was the best reading of the regulation without regard to deference, Opp. 10, while the petitioner's merits brief argues that the plain text of the regulations contradicts the agency's view and that the best reading supports the petitioner, Pet. Br. 55–61. The question on which this Court granted certiorari, however, assumes that, as the court of appeals concluded, the regulation is ambiguous and that the continued vitality of the *Auer/Seminole Rock* doctrine affects the outcome of the case.

of deference as other actions. That is, the action should be upheld unless it is arbitrary and capricious, an abuse of discretion, contrary to discernible dictates of statutes or regulations, or arrived at without procedures required by law. *See* 5 U.S.C. § 706(2).[3]

Such a view makes sense because a regulation, like a statute, cannot unambiguously anticipate and prescribe outcomes for every instance to which it may apply. Therefore, in instances where a rule does not provide an unambiguous answer, determining the rule's proper application—what the petitioner here calls its "best" or "fairest" interpretation, Pet. Br. 3—requires a determination that does not rest solely on the rule's language. The determination must also reflect considerations of the relevant policies animating the regulatory scheme. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297, 307–08 (2017). In cases involving regulatory authority, however, such policy determinations have been delegated to the agency, within the constraints set by the governing statute. In that circumstance, the "best" reading is one that the agency has provided and explained through lawful administrative processes. Courts cannot reasonably resolve a regulation's meaning without deferring to the agency's determination (and explanation) of the proper result, arrived at through the appropriate procedures that govern whatever agency action has supplied the agency's

---

[3] As Justice Thomas has pointed out, justifying *Auer*/*Seminole Rock* simply on the basis that the agency knows what it meant when promulgating a rule would fail to account for the application of deference when the agency construing the rule is not the one that promulgated it or when the agency has changed its own construction of the rule. *See Perez*, 135 S. Ct. at 1223 (Thomas, J., concurring in the judgment).

construction. As Congress commanded in the APA, such an agency determination must be upheld if it is a reasonable exercise of the agency's authority.

That said, agencies do not have carte blanche to issue vague or ambiguous rules and then attach to the rules whatever interpretations suit their whims. *See Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). An agency's construction of a regulation, like a statutory construction, cannot disregard express terms of the governing law. And even where ambiguity exists, the agency remains constrained by the requirement of reasonableness: A court must set aside an agency action as arbitrary and capricious or an abuse of discretion if the agency has failed to "cogently explain why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 48. Regulatory interpretations must meet the same criteria of rationality as other agency actions:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, [a court] must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to

> make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given."

Id. at 43 (citations omitted).

Thus, notwithstanding some language in *Auer* that might be read to make an agency's construction of a regulation "controlling" as long as it does not contradict unambiguous terms of the regulation, *Auer*, 519 U.S. at 461, *Auer/Seminole Rock* deference can be no more absolute than *Chevron* deference. Although some decisions of this Court appear to give short shrift to review of the reasonableness of an agency's construction, *Seminole Rock* itself and many of the cases following it in fact have considered whether the agency's construction is reasonable, as opposed to merely possible linguistically, and have sustained it only after finding it reasonable. *See, e.g., Ehlert v. United States*, 402 U.S. 99 (1971) (stating that the Court was "obligated to regard as controlling a *reasonable*" interpretation (emphasis added)); *see also* Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 Conn. L. Rev. 226, 246–47, 251–54, 256 (2013) (describing examples of the Court's assessment of the reasonableness of an agency's interpretation in *Seminole Rock* and later cases following it).

As under *Chevron*, the requirement of reasonableness is equivalent to and follows from the APA's requirement that courts set aside arbitrary and capricious action. The requirement therefore imposes significant constraints on an agency's ability to take action premised on a new construction of a rule. As this Court has held, the requirement of rational explana-

tion that flows from the APA's arbitrary-and-capricious standard of review demands that agencies acknowledge and give reasons for changes in position. *See Encino Motorcars*, 136 S. Ct. at 2125–26; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The requirement that agencies consider all factors relevant to their actions, *see State Farm*, 463 U.S. at 43, also carries with it the obligation to take into account possible reliance interests when an agency changes its construction of a regulation, *see Encino Motorcars*, 136 S. Ct. at 2126. Conversely, consistent agency constructions or ones contemporaneous with a rule's promulgation, as the Court has long recognized, are more easily sustained as reasonable. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994). These principles give ample scope to an agency's authority to change policies within the constraints imposed by the express requirements of statutes and rules, *Brand X*, 545 U.S. at 981, while at the same time balancing that deference with meaningful review of the reasonableness of such change.

Procedural constraints on agency action are also relevant to whether an agency's construction of a regulation is sustainable under the APA's deferential standards. Agency actions may be sustained under the deferential arbitrary-and-capricious standard only if they comply with applicable procedural requirements. *See* 5 U.S.C. § 706(2)(D). Moreover, the inference that Congress intends an agency's resolution of an issue to be authoritative is available only where the agency acts on the basis of "congressional authorizations to engage in the process ... that produces [actions] for which deference is claimed." *Mead Corp.*, 533 U.S. at 229. "It is fair to assume generally that Congress contemplates administrative action with the effect of law

when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230.

These principles are as applicable to agency regulatory interpretations as to other agency pronouncements. A regulatory interpretation that is not the result of a lawful exercise of authority delegated by Congress to resolve issues through a particular type of agency action should not qualify for review under the deferential standard of the APA. This court thus has likely extended *Seminole Rock/Auer* deference too far in applying it to statements of an agency's position by staff or lawyers, including statements in legal briefs. *See Auer*, 519 U.S. at 462. Such interpretations, which are not the result of exercises of deliberative authority delegated by Congress, are entitled to the weight that respectful consideration of their "power to persuade" may give them, *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but not to the added weight of an action that may be set aside only if arbitrary and capricious.

If *Auer* has gone too far in extending deference to some interpretations not entitled to it, however. this case is not the proper vehicle in which to correct that defect. The interpretation here was issued by the agency in a formal adjudication that Congress expressly empowered it to conduct. Such a proceeding falls within the heartland of the kinds of agency actions for which Congress typically prescribes deferential standards of review.[4] A recent study, moreover,

---

[4] The statute providing for review in this case, 38 U.S.C. § 7292(d)(1), mirrors the standards of review set forth in 5 U.S.C. § 706(2).

demonstrates that *Seminole Rock/Auer* deference is more often extended to adjudications, other relatively formal actions, and regulatory preambles than to briefs and other pronouncements that lack the force of law. *See* William Yeatman, *Note: An Empirical Defense of* Auer *Step Zero*, 106 Geo. L.J. 515, 520 & nn.23 & 24 (2018). A doctrine most commonly applied within its proper sphere should not be discarded wholesale because of concerns about its application at the margins.

Deference to agency regulatory constructions is not the equivalent of lawlessness or judicial self-abnegation. Rather, *Seminole Rock/Auer* deference, properly applied, reflects that the proper construction of an ambiguous regulation cannot be determined without reference to the agency actions construing it, and that basic principles of administrative law embodied in the APA require that actions reflecting reasonable constructions of regulations be upheld by the courts.

CONCLUSION

For the foregoing reasons, this Court should, regardless of its disposition of the case, do nothing to call into question the legitimacy and continued vitality of the *Chevron* doctrine, and the Court should decline to hold categorically that an agency's construction of an ambiguous regulation is not entitled to the deference this Court has long afforded under such decisions as *Auer* and *Seminole Rock* and that the APA commands.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae Public Citizen, Inc.

January 2019

No. 18-15

In The
Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, TEXAS PUBLIC POLICY FOUNDATION, GOLDWATER INSTITUTE, BEACON CENTER OF TENNESSEE, AND MISSISSIPPI JUSTICE INSTITUTE IN SUPPORT OF PETITIONER

KIMBERLY S. HERMANN
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org

Counsel for Amici Curiae

[Additional Counsel Listed On Signature Page]

January 31, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The Court should overrule *Seminole Rock/Auer* deference because it is inconsistent with separation of powers principles	5
A. *Seminole Rock/Auer* deference provides federal agencies with a vehicle to adjudicate their own ambiguous regulations	5
B. The power to interpret the meaning of a regulation properly belongs to the judiciary	7
II. The Court should overrule *Seminole Rock/Auer* deference because it deprives Congress and the People the benefits of the APA's notice-and-comment procedures	13
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 4

Auer v. Robbins, 519 U.S. 452 (1997) ..... *passim*

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) ..... *passim*

Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) 2, 11

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 11

City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013) 3, 4, 6

Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013) 14

FCC v. Fox Television Stations, 556 U.S. 502 (2009) 13

Flytenow v. FAA, 137 S. Ct. 618 (2017) 1, 2

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 4

Garco Constr., Inc. v. Speer, 583 U.S. ___ (2018) 1

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) 10

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 12

Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991) 11

Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018) 1

TABLE OF AUTHORITIES – Continued

Page

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 3

Pauley v. Bethenergy Mines, Inc., 501 U.S. 680 (1991) 10

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) 11, 15, 16

Shands Jacksonville Med. Ctr. v. Burwell, 139 F. Supp. 3d 240 (D.D.C. 2015) 15

Smiley v. Citibank, 517 U.S. 735 (1996) 11

Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50 (2011) 7, 10

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 15

Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) 1

Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 13

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 9

STATUTES

5 U.S.C. §§ 551, *et seq.* 5, 13, 14, 15, 16

5 U.S.C. §§ 553(b)-(c) 13

Ariz. Rev. Stat. § 12-910, *as amended by*, H.B. 2238, 53rd Legis. 2d Reg. Sess., 2018 Ariz. Legis. Serv. Ch. 180 (Apr. 11, 2018) 2

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

1 Charles de Secondat Montesquieu, The Complete Works of M. de Montesquieu (London: T. Evans, 1777) 7, 8

1 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise (3d ed. 1994) 10

2 Max Farrand, Records of the Federal Convention of 1787 (1911) 12

Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) 11

Charles Pinckney, Observations on the Plan of Government, Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 Max Farrand, Records of the Federal Convention of 1787 (rev. ed. 1966) 8

Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Soc. Phil. & Pol'y 196 (1991) 9

Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" Before the Senate Comm. on the Judiciary, 114th Cong. (2015) 5

TABLE OF AUTHORITIES – Continued

Page

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 15

Martin H. Redish & Elizabeth J. Cisar, *"If Angels were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449 (1991) 9

NFIB Small Business Legal Center, *The Fourth Branch & Underground Regulations* (2015) 16

Office of the Federal Register, *Federal Register Pages Published 1936-2017* (2017) 6

Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193 (1982) 13

S. Doc. No. 77-8, Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies (1941) 13, 14

The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1961) 4

The Federalist Nos. 47-51 (James Madison) (Clinton Rossiter ed., 1961) 8, 9

The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 12

INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court, including such cases as *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018). SLF also files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g.*, *Garco Constr., Inc. v. Speer*, 583 U.S. ___ (2018); *Flytenow v. FAA*, 137 S. Ct. 618 (2017).

The Texas Public Policy Foundation (TPPF) is a nonprofit, nonpartisan research organization based in Austin, Texas, that promotes liberty, personal responsibility, and free enterprise through academically-sound research and outreach. Since its inception in 1989, TPPF has emphasized the importance of limited government, private enterprise, private property rights,

---

[1] *Amici curiae* notified the parties of their intent and request to file this brief. All parties consented to the filing of this brief. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

and the rule of law. In accordance with its central mission, TPPF has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to advance principles of liberty and the Constitution.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings, and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when a case directly implicates its or its clients' objectives. *See, e.g.*, *Flytenow*, 137 S. Ct. 618. Goldwater Institute scholars authored, and Arizona enacted, legislation ending *Chevron*-style and *Seminole Rock/Auer*-style judicial deference given to state administrative agency interpretations of agency regulations, or constitutional or statutory provisions. Ariz. Rev. Stat. § 12-910, *as amended by*, H.B. 2238, 53rd Legis. 2d Reg. Sess., 2018 Ariz. Legis. Serv. Ch. 180 (Apr. 11, 2018).

The Beacon Center is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals.

The Mississippi Justice Institute (MJI) is a nonprofit, public interest law firm and the legal arm of the Mississippi Center for Public Policy (MCPP) an

independent, nonprofit, public policy organization based in Jackson, Mississippi. MJI represents Mississippians when government actions threaten their state or federal constitutional rights. MJI's activities include direct litigation on behalf of individuals, intervening in cases important to public policy, participating in regulatory and rule making proceedings, and filing *amicus* briefs to offer unique perspectives on significant legal matters in Mississippi and federal courts.

This case is of particular interest to *amici* because the continued application of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), affords the executive branch opportunities to usurp both judicial and legislative powers that the Constitution does not grant it. Combining that deference with a federal agency's power to "consider . . . its policy on a continuing basis," *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), opens the door to arbitrary and capricious agency actions that will remain unchecked. This case presents the Court with an opportunity to preserve our structure of government and overrule the highly deferential standard set forth in *Seminole Rock/Auer*.

SUMMARY OF ARGUMENT

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013)

(Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities[,]" *id.*, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a limited government. Addressing concerns that the proposed national government would usurp the People's power to govern themselves, James Madison explained: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). Today's wide-reaching "administrative state with its reams of regulations would leave [the Founders] rubbing their eyes." *City of Arlington*, 133 S. Ct. at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (citation omitted).

This case involves one such example of the executive branch's overreach and disregard for our carefully crafted government structure, but there are many thousands of other examples. The government action at issue is emblematic of a systemic problem in a government that no longer imposes meaningful checks on executive action. This case provides an opportunity to

address doubts raised by several members of this Court about the continued validity of *Seminole Rock/Auer*.

Amici maintain that any deference afforded to a federal agency must be consistent with the Constitution and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, *et seq*. Deference to an agency's interpretation of its own ambiguous regulation offends the separation of powers principles embedded in our Constitution because it enables agencies to circumvent the APA's notice-and-comment procedures. As applied here, *Seminole Rock/Auer* deference gives Veterans Affairs license to issue arbitrary and capricious interpretations of its own regulations that carry the force of law. *Amici* therefore join Petitioner in asking this Court to overrule *Seminole Rock/Auer* deference.

ARGUMENT

I. The Court should overrule *Seminole Rock/Auer* deference because it is inconsistent with separation of powers principles.

A. *Seminole Rock/Auer* deference provides federal agencies with a vehicle to adjudicate their own ambiguous regulations.

Although nobody can say for sure just how many federal agencies exist, one count put the number at "over 430 departments, agencies, and sub-agencies in the federal government." *Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" Before the Senate Comm.*

on the Judiciary, 114th Cong. 1 (2015) (statement of Senator Grassley) ("*Examining the Federal Regulatory System*"). As federal agencies grow in number, so does the Federal Register. For example, from 2008 to 2016, the Federal Register grew from 80,700 to 97,110 pages. Office of the Federal Register, *Federal Register Pages Published 1936-2017* (2017).[2] That is an increase of 20% during the tenure of just one president. And from 2013 to 2014, "the federal bureaucracy finalized over 7,000 regulations." *Examining the Federal Regulatory System*. When one compares those 7,000 regulations to the 300 statutes enacted by Congress during those same years, the growing power of the federal bureaucracy is undeniable. *Id.*

This growing number of official regulations tells only part of the story. As this Court is well aware, federal agencies issue, interpret, and enforce the rules that govern our lives. "[A]s a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting). The authority agencies exercise is startling. What is more, courts rarely question this concentration of power. Instead, they frequently rely on *Seminole Rock/Auer* deference and abdicate their judicial interpretive power to the agencies, giving them unchecked

[2] https://www.federalregister.gov/uploads/2018/03/pagesPublished2017.pdf.

power to interpret their own rules (formal and informal). Under this theory of deference, an agency's interpretation is "controlling" unless it is "plainly erroneous or inconsistent with the regulation[.]" *Seminole Rock*, 325 U.S. at 414. Thus, to state the obvious, *Seminole Rock/Auer* deference provides the over 400 federal departments, agencies, and sub-agencies with the means to write their own regulations, enforce their own regulations, and interpret their own regulations – essentially supplanting the legislature and the judiciary, and proclaiming themselves as supreme.

B. The power to interpret the meaning of a regulation properly belongs to the judiciary.

This concentration of power is unconstitutional. As the author of *Auer* himself later explained, *Seminole Rock/Auer* deference is "contrary to [the] fundamental principles of separation of powers." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) (Scalia, J., concurring). This is because the Constitution contemplates that each branch of government will jealously guard its own prerogatives, thus protecting individual liberty. But with *Seminole Rock/Auer* deference, the judiciary leaves the field, removing an indispensable check on federal agency activities.

"Political liberty . . . is there only when there is no abuse of power." 1 Charles de Secondat Montesquieu, The Complete Works of M. de Montesquieu 197 (London: T. Evans, 1777). "'There can be no liberty where the legislative and executive powers are united in the

same person, or body of magistrates' or, 'if the power of judging be not separated from the legislative and executive powers.'"[3] The Federalist No. 47, at 299. As Montesquieu explained:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.

Montesquieu, at 199. The same is true in the reverse. If the power of the legislator joins with the judiciary, the legislator would then be the judge.

These foundational principles were front and center during the Constitutional Convention. As Charles Pinckney observed: "In a government, where the liberties of the people are to be preserved . . . the executive, legislative and judicial, should ever be separate and distinct, and consist of parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government, Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 Max Farrand, Records of the Federal Convention of 1787, 108 (rev. ed. 1966); *see* The Federalist Nos. 47-51, at 297-322 (James Madison) (Clinton Rossiter ed., 1961)

---

[3] Quoting Montesquieu in Federalist No. 47, James Madison explained that these passages "sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author." The Federalist No. 47, at 300.

(explaining and defending the Constitution's structural design of separated powers).

Our Founding Fathers thus created a government of limited power, both as compared to the states and to its own branches.[4] "Separation of powers and federalism form the fundamental matrix or Euclidian plane of our constitutional law." Martin H. Redish & Elizabeth J. Cisar, *"If Angels were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449, 451 n.8 (1991) (citing Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Soc. Phil. & Pol'y 196 (1991)). "In structuring their unique governmental form, the Framers sought to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability." *Id.* at 451. As Justice Frankfurter later reminded us in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the purpose of the separation of powers principles is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Id.* at 629 (Frankfurter, J., concurring). This is because "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority" leads to the "accretion of dangerous power[.]" *Id.* at 594.

---

[4] "In order to form correct ideas . . . it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct." The Federalist No. 47, at 298.

Under these principles, any action taken by one branch of the federal government that presumes to encroach upon the constitutionally assigned functions of another branch presents a fundamental threat to the preservation of liberty. For instance, it is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring). Thus, *Seminole Rock/Auer* deference creates separation of powers issues and threatens individual liberty by giving federal agencies, not the judiciary, the primary role in determining the meaning of ambiguous regulations. *See Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461-62; *see also Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that the Supreme Court's decisions on agency deference "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

Some argue that *Seminole Rock/Auer* deference is "common sense" because an agency "is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purposes in issuing the rule." 1 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 6.10, at 282 (3d ed. 1994). At times, this Court's rationales for *Seminole Rock/Auer* deference reflect these arguments. *See Pauley v.*

Bethenergy Mines, Inc., 501 U.S. 680, 697 (1991) (explaining that interpretation of agency rules involves policy considerations); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) (justifying deference to agency interpretations because of agency's expertise and competence to understand and explain its own rules).

Yet this deference rests on the premise that Congress has the constitutional authority to delegate to an agency the power to interpret its own regulations. While Congress *may* currently be able to vest agencies with limited legislative authority to fill ambiguous statutory gaps, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984),[5] it may *not* vest agencies with authority to interpret their own regulations. This is because under *Chevron*, Congress delegates its *own* legislative authority and not the powers constitutionally assigned to the judicial branch.[6] *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203-04 (2015) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)) (explaining that

---

[5] Courts have rarely used the delegation doctrine to discipline Congress, or by extension, to rein in federal agencies. "Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315 (2000).

[6] Underlying *Chevron* is the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency . . . to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996).

rules issued through the notice-and-comment process are "legislative rules"). Congress cannot delegate a power that it does not have.

By contrast, the power to interpret laws lies solely with the courts. The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts."). The Constitution assigns the courts with the authority "to ascertain . . . the meaning of any particular act proceeding from the legislative body." *Id.* It follows that when an agency writes a law – whether it be through a formal rule, an opinion memorandum, or a guidance letter – it acts as a legislative body. It must also follow that, as our Framers put it, "the power of making ought to be kept distinct from that of expounding the laws." 2 Max Farrand, Records of the Federal Convention of 1787, 64 (1911). In other words, the power to interpret agency rules (both formal and informal) "belongs" to our country's judges.

While the growing administrative state tests the limits of separation of powers principles, it does not change the judiciary's duty to "say what the law is." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). *Seminole Rock/Auer* deference gives federal agencies a roadmap to usurp the role of the judiciary and unilaterally write, enforce, and interpret laws. For these reasons, this Court should overrule *Seminole Rock/Auer* and properly return the interpretive role to the courts.

II. The Court should overrule *Seminole Rock/Auer* deference because it deprives Congress and the People the benefits of the APA's notice-and-comment procedures.

Despite Congress's all too frequent delegation of legislative power to federal agencies, there once was a time when Congress recognized the hazard that agencies pose to the democratic process and liberty. For over 20 years, "a succession of bills offering various remedies appeared in Congress," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 38 (1950), leading to the APA. The law was then, and is today, "a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *FCC v. Fox Television Stations*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982)).

It follows then that the APA's chief procedural safeguard, Section 553, requires administrative agencies to provide "notice of proposed rule making" and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. §§ 553(b)-(c). Congress understood that if agencies were going to wield legislative power, their procedures must "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, Final

Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, at 102 (1941). Public notice-and-comment is "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id.* at 103.

In these notice-and-comment procedures, Congress sought to hold agency heads accountable to both Congress and the public. Congress also sought to foster predictability and stability in the administrative arena and to establish a baseline against which the courts could measure future agency action. *Seminole Rock/Auer* deference undermines these objectives because it effectively exempts agencies from the APA's notice-and-comment requirements. It leaves agencies free to promulgate ambiguous regulations and later interpret them, all the while knowing that their interpretation will never be subject to judicial review. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., dissenting) (internal quotation marks omitted) ("Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a flexibility that will enable clarification with retroactive effect."). Further, *Seminole Rock/Auer* deference leaves agencies free "to control the extent of [their] notice-and-comment-free domain," and provides them the opportunity "[t]o expand this domain, . . . [by] writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked

by notice and comment." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

Just as there is no incentive for an agency to create airtight regulations, there is no incentive for "an agency [to] give clear notice of its policies either to those who participate in the rulemaking process prescribed by the APA or to the regulated public." *Id.*; *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524-25 (1994) (Thomas, J., dissenting) (noting that *Auer* deference undermines the objective of providing regulations that are "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law"). As a result, *Seminole Rock/Auer* deference relieves an agency of the burden of the "imprecision that it has produced." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). And that burden instead falls on the regulated community.

In addition to shifting the burden of uncertainty to the regulated community, *Seminole Rock/Auer* deference undermines a major purpose of the APA – preserving our government structure. Legal regimes are more likely to endure if aggrieved parties believe that they had an adequate opportunity to voice objections and that the disappointing result was the product of a fair fight. Popular acceptance of agency rules depends on the "legitimacy that comes with following the APA-mandated procedures for creating binding legal obligations." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 268 (D.D.C. 2015).

This is why agency actions and interpretations that proceed without notice-and-comment, like they do here, lack legitimacy and put the regulated community at risk. If an agency advances an interpretation of its regulations that requires the regulated community to take, or refrain from taking, a particular action, that interpretation becomes de facto – if not de jure – law on the matter, regardless of the form the interpretation takes. It follows that the regulated community must either conform to the interpretation or risk an enforcement action, administrative or judicial, based on alleged non-compliance.[7] As Justice Scalia explained:

> [I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

Perez, 135 S. Ct. at 1212.

The Veterans Affairs' interpretation is but one example of how federal agencies disregard the APA when they interpret their own regulations. And the Federal Circuit's reliance on *Seminole Rock/Auer* allows agencies continuously to change their interpretations of their own regulations with the force of law. This opens the door to the type of abuse Congress sought to prevent with the APA. Until this Court demands that the executive branch abide by the APA, federal agencies

---

[7] *See generally* NFIB Small Business Legal Center, *The Fourth Branch & Underground Regulations* (2015), http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.

will continue their unconstitutional usurpation of power.

CONCLUSION

For all these reasons, and those stated by Petitioner, *amici* request that this Court overrule *Auer v. Robbins*, 519 U.S. 452, and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, and reverse the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

ROBERT HENNEKE
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Ave.
Austin, TX 78701

JONATHAN RICHES
ADITYA DYNAR
GOLDWATER INSTITUTE SCHARF–NORTON CENTER FOR CONSTITUTIONAL LITIGATION
500 E. Coronado Rd.
Phoenix, AZ 85004

AARON R. RICE
MISSISSIPPI JUSTICE INSTITUTE
520 George St.
Jackson, MS 39202

KIMBERLY S. HERMANN
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org

BRADEN BOUCEK
BEACON CENTER OF TENNESSEE
P.O. Box 198646
Nashville, TN 37219

Counsel for Amici Curiae

January 31, 2019

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR STATE AND LOCAL GOVERNMENT ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, DC 20001

SAMUEL ECKMAN
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue
Los Angeles, California 90071

ALLYSON N. HO
Counsel of Record
KATHRYN CHERRY
BRADLEY G. HUBBARD
ELIZABETH A. KIERNAN
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Cooperative Federalism Depends on Mutual Participation by Federal, State, and Local Governments. 5

A. Federal Law Informs State Laws and Imposes Affirmative Obligations on State and Local Governments. 6

B. State and Local Governments' Participation in Agency Rulemaking Improves the Quality and Efficacy of Federal Law. 8

II. The *Auer* Regime Deprives State and Local Governments of the Opportunity to Participate in Federal Policy-Making 12

III. Auer Should Be Overruled. 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Auer v. *Robbins*,
519 U.S. 452 (1997) ..... *passim*

Bowles v. *Seminole Rock & Sand Co.*,
325 U.S. 410 (1945) 3, 4

K.M. ex rel. Bright v. *Tustin Unified Sch. Dist.*,
725 F.3d 1088 (9th Cir. 2013) 18

Christopher v. *SmithKline Beecham Corp.*,
567 U.S. 142 (2012) 20

FCC v. *AT&T Inc.*,
562 U.S. 397 (2011) 20

Gloucester Cty. Sch. Bd. v. *G.G. ex rel. Grimm*,
2017 WL 167311 (U.S. Jan. 10, 2017) 17

Garcia v. *San Antonio Metro. Transit Auth.*,
469 U.S. 528 (1985) 8

Garco Const., Inc. v. *Speer*,
138 S. Ct. 1052 (2018) 4

Hodel v. *Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) 6

Oregonians for Floodplan Protection et al. v. *Dep't of Commerce*, 1:17-cv-01179 (D.D.C. June 15, 2017) 16

Perez v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015) 19, 21

Purdham v. *Fairfax Cty. Sch. Bd.*, 637 F.3d 421 (4th Cir. 2011) 17

Statutes

5 U.S.C. § 553 ..... 8, 12, 19

20 U.S.C. §§ 1400–1482 ..... 7, 18

33 U.S.C. § 1251 *et seq.* 9

42 U.S.C. §§ 601–619 7

42 U.S.C. §§ 1396–1396w-5 7

42 U.S.C. § 1437(g) 7

42 U.S.C. §§ 7401-7671q 7

42 U.S.C. § 7410 ..... 8, 9

42 U.S.C. § 12101 *et seq.* 10, 18

Regulations

38 C.F.R. § 3.156(c)(1) 20

Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37504 (June 29, 2015) 10

Establishing a Deductible for FEMA's Public Assistance Program, 81 Fed. Reg. 3082 (Jan. 20, 2016) 11

Establishing a Deductible for FEMA's Public Assistance Program, 82 Fed. Reg. 4064 (Jan. 12, 2017) 11

Medicaid Program: Time Limitation on Recordkeeping Requirements Under the Drug Rebate Program, 69 Fed. Reg. 508 (Jan. 6, 2004) 10

Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 28658 (May 9, 2016) 10

Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (July 26, 2010) 10

Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017) 11

Other Authorities

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118 (2016) 20

Dear Colleague Letter (Dec. 21, 2018), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf 15

Jeff Miller, *Army Corps Reverses Misguided Policy Requiring Clearing Trees from Levees* (Mar. 25, 2014), available at https://www.biologicaldiversity.org/news/press_releases/2014/levees-03-25-2014.html 16

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 21

Joint "Dear Colleague" Letter (Feb. 22, 2017), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf 25

Joint "Dear Colleague" Letter (Nov. 12, 2014), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-effective-communication-201411.pdf 25

Joint "Dear Colleague" Letter on the Nondiscriminatory Administration of School Discipline (Jan. 8, 2014), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html 14

Joint "Dear Colleague" Letter on Transgender Students (May 13, 2016), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf 17

Josh Bendor & Miles Farmer, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes*, 122 Yale L. J. 1280 (Mar. 2013) 6, 7

Letter Re: Dkt. No. EPA-HQ-OW-2011-0409 (July 29, 2011), available at http://www.naco.org/sites/default/files/documents/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf 9

Letter Re: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, RIN 1190-AA65 (Oct. 7, 2016), available at http://static1.1.sqspcdn.com/static/f/624306/27293532/1476719964160/ADA+Accessibility+Comments_as_filed.docx.pdf?token=fUEpD9Lf6cq0kLrEswOoG2o6%2FBk%3D 10, 11

Michael J. Lotito & Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance*, (June 7, 2017), available at http://www.littler.com/publication-press/publication/dol-withdraws-joint-employer-and-independent-contractor-guidance 14

News Release, Office of Public Affairs, *US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance* (June 7, 2017), available at http://www.dol.gov/newsroom/releases/opa/opa20170607 14

NSBA Letter Re: Dear Colleague Letter Issued November 12, 2014 (Mar. 5, 2015), available at http://www.nsba.org/sites/default/files/file/NSBA-response-2014-DCL-Communication-Needs-3-5-15.pdf 18

Retention & Recruitment for the Volunteer Emergency Services (2004), available at http://www.in.gov/dhs/files/retainrecruit.pdf 16

Wage and Hour Opinion Letter FLSA 2001-19 (Nov. 27, 2001), available at https://www.dol.gov/whd/opinion/FLSA/2001/2001_11_27_19_FLSA.htm 15

INTEREST OF *AMICI CURIAE*[*]

The following state and local government associations respectfully submit this *amici curiae* brief in support of petitioner:

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's fifty States, its Commonwealths, and its Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The Government Finance Officers Association ("GFOA") is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public

---

[*] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of over 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive amicus briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state supreme and appellate courts.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National School Boards Association ("NSBA") represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

Amici offer additional reasons why this Court should abandon *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Amici* have a strong interest in apprising the Court of the significant, adverse, and unwarranted consequences that the Nation's state and local governments suffer as a result of the binding deference afforded to federal agencies' interpretations of their own regulations. Those regulations often set rules that state and local governments must follow in implementing federal policy. When those regulations can be abandoned or materially altered by agencies outside the notice-and-comment process, state and local governments are forced to adapt to rules that are often costly, disruptive, and detrimental to both federal and local interests.

Abandoning *Auer* will have the salutary effect of incentivizing federal agencies to use the notice-and-comment process when imposing burdens on state and local governments—almost certainly resulting in regulations that are clearer, more straightforward, and better informed by the local knowledge and insight of those who will be most directly affected by them. This, in turn, will strengthen (or at least not undermine) federalism and secure the benefits that flow from it.

SUMMARY OF ARGUMENT

The rule first articulated in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and affirmed in *Auer* v. *Robbins*, 519 U.S. 452 (1997), "uniquely harms the states" and local governments whose laws can be preempted, shaped, or rendered ineffectual by federal law—including federal regulations. Br. of *Amici Curiae* the States of Utah *et al.* at 1, *Garco Const., Inc.* v. *Speer*, 138 S. Ct. 1052 (2018) (17-225). Specifically, the *Auer* regime encourages federal agencies to enact policies that affect state and local governments without the benefit of their specialized knowledge of local conditions—a result that seriously undermines federalism as well as separation of powers.

State and local governments are frequently charged with implementing federal policy through the federal regulatory process. Notice-and-comment rulemaking provides state and local governments with the opportunity to educate often insulated federal agencies about the practical effects of proposed policies—and to bring specialized local knowledge to bear on formulating and implementing those policies. In this way, the expertise of each level of government can be

leveraged to achieve national objectives while remaining cognizant of state and local prerogatives—and safeguarding individual liberty all the while.

The *Auer* regime, however, turns collaborative federalism on its head. By demanding deference to an agency's interpretation of its own regulations, *Auer* provides a powerful incentive for agencies to abandon the notice-and-comment process that facilities dialogue among federal, state, and local governments. This, in turn, invites dramatic shifts in federal policy with each new administration—and tends to result in policies that lack the clarity and wisdom that public participation can engender. Worse still, when agencies *do* engage in notice-and-comment rulemaking under the *Auer* regime, they do so knowing that by crafting ambiguous regulations they can expand their own power to unilaterally dictate federal policy through subsequent interpretation. In this way, *Auer* threatens not only separation of powers but also federalism—and, ultimately, individual liberty. *Auer* should be overruled.

ARGUMENT

I. Cooperative Federalism Depends on Mutual Participation by Federal, State, and Local Governments.

Programs and policies are often designed at the national level but implemented at the state and local levels. See Josh Bendor & Miles Farmer, *Curing the Blind Spot in Administrative Law: A Federal Common Law Framework for State Agencies Implementing Cooperative Federalism Statutes* ("*Curing the Blind Spot*"), 122 Yale L. J. 1280, 1288–89 (Mar. 2013).

When cooperative federalism works properly, federal, state, and local governments each contribute their unique advantages to achieving shared, national objectives. While the federal government sets nationwide policies and marshals resources, state and local governments deploy their specialized knowledge of local circumstances to implement those policies effectively, efficiently, and consistently with their own priorities. See, *e.g.*, *Hodel* v. *Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981) ("[T]he Surface Mining Act establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs."). When cooperative federalism goes wrong, however, state and local governments become saddled with unwieldy, intrusive, and ineffectual federal programs that cost money and time already in all-too-short supply.

A. Federal Law Informs State Laws and Imposes Affirmative Obligations on State and Local Governments.

Although States are sovereign, state and local governments (and state and local laws) are deeply intertwined with federal law—including federal agency rulemakings.

First, state and local governments may be charged with "implementing purely federal law, acting as a kind of contractor for [a] federal program." *Curing the Blind Spot*, *supra*, at 1288. When invoking Congress's Spending Clause power, for instance, the federal government provides state and local governments with

funds to pursue specified policies, but attaches strings to those funds—requiring their use within federal standards to achieve federal policies subject to federal oversight. For example, under the Social Security Disability Insurance program, state agencies are tasked with making initial claims determinations under standards that are established solely by federal law. See *id.* at 1289 & n.45.

Second, state and local governments may implement their *own* laws subject to federal requirements and oversight—for example, where the federal government provides funding to States contingent on their enacting laws that satisfy certain minimum standards. See *id.* at 1288–89. There is no shortage of examples of federal programs that follow this framework: the Temporary Assistance to Needy Families program, 42 U.S.C. §§ 601–619; Medicaid, 42 U.S.C. §§ 1396–1396w-5; public housing programs, 42 U.S.C. § 1437(g); and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400–1482.

Third, state law may be implemented "side-by-side with federal law, subject to federal requirements and oversight," such as where state law provides a component of a broader federal program. *Curing the Blind Spot*, *supra*, at 1288–89. For example, the Clean Air Act, 42 U.S.C. §§ 7401–7671q, requires States to enact and oversee "state implementation plans," which States have wide discretion to shape so long as they are deemed likely to ensure the State's compliance with national air quality standards set by the EPA. See 42 U.S.C. § 7410.

Under each of these three models, state and local governments must first know what federal law *is* for

cooperative federalism to work. The notice-and-comment rulemaking required by the Administrative Procedure Act ("APA"), facilitates this result by (i) ensuring that States and localities have notice of impending changes to federal policies and (ii) providing a forum in which they can seek to influence, clarify, and improve new policies. See U.S.C. § 553.

B. State and Local Governments' Participation in Agency Rulemaking Improves the Quality and Efficacy of Federal Law.

Cooperative federalism is not a one-way street. While numerous federal programs charge state and local governments with implementing federal policy, they frequently give state and local governments a voice in shaping those policies, as well. This benefits not only States and localities, but also the Federal Government, as States and localities bring new perspectives and localized knowledge to nationwide problems. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576–77 (1985) (Powell, J., dissenting) ("[Federal actors] have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible * * * [and] hardly are as accessible and responsive as those who occupy analogous positions in state and local governments.").

1. In 2011, the EPA and U.S. Army Corps of Engineers released proposed guidance concerning the definition of "waters of the United States" under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*,

which expanded the waters subject to federal jurisdiction by 17 percent. See *Letter Re: Dkt. No. EPA-HQ-OW-2011-0409*, 3 (July 29, 2011).[1]

Amicus the National Association of Counties—which is "the only national organization that represents county governments in the United States"—suggested that the guideline be withdrawn. *Id.* at 1. As the Association explained, counties were "coping with shrinking budgets," and many were "laying off their staffs, delaying or cancelling capital infrastructure projects, cutting services, and fighting to keep firefighters and police on the streets." *Ibid.* An additional federal mandate would require counties to spend money they simply did not have.

Moreover, the Association explained, the guidance would subject covered waters to *all* CWA regulations—including the federal permitting process. That process, which already takes years, has resulted in "flooding of constituent and business properties" while applicants wait for approval, forcing counties to "choos[e] between public safety and environmental protection." *Id.* at 3. In light of this important information uniquely within the ken of state and local governments, the EPA engaged in a "focused outreach" program to discuss the guidance with state and local government organizations before promulgating the final rule. *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37504, 37103 (June 29, 2015).

---

[1] Available at http://www.naco.org/sites/default/files/documents/Waters%20US%20Draft%20guidance%20NACo%20Comments%20Final.pdf.

2. In 2004, the Department of Health and Human Services proposed a rule establishing a three-year recordkeeping requirement for drug manufacturers under the Medicaid drug rebate program. After state law enforcement officials informed the Department that allowing manufacturers to destroy records after only three years would materially reduce States' ability to review such records to prosecute and deter fraud, the agency reconsidered the requirement, ultimately opting for a 10-year recordkeeping requirement. *Medicaid Program: Time Limitation on Recordkeeping Requirements Under the Drug Rebate Program*, 69 Fed. Reg. 508, 510 (Jan. 6, 2004).

3. In 2016, the Department of Justice proposed a rule that would have required state and local government websites to be accessible under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq*. See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities*, 81 Fed. Reg. 28658 (May 9, 2016); see also *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460 (July 26, 2010) (first proposing rule).

State and local governments expressed support for the proposed rule's goals but voiced concerns about the cost and difficulty of implementing the rule in the manner proposed by the Department. See *Letter Re: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations,*

RIN 1190-AA65, 1 (Oct. 7, 2016).[2] Two months later, the Department withdrew the proposed rule. See *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions*, 82 Fed. Reg. 60932 (Dec. 26, 2017).

4. In 2016, the Federal Emergency Management Agency ("FEMA") proposed a rule that would have required States to pay a deductible before receiving federal aid to repair public infrastructure in the wake of a disaster. *Establishing a Deductible for FEMA's Public Assistance Program*, 81 Fed. Reg. 3082 (Jan. 20, 2016). After receiving comments from 28 States and 28 local jurisdictions, FEMA acknowledged that the proposal would impose serious "burdens, either financial or administrative, * * * [on] the States." *Establishing a Deductible for FEMA's Public Assistance Program*, 82 Fed. Reg. 4064, 4064, 4070 (Jan. 12, 2017). FEMA issued a supplemental notice in 2017 addressing those concerns. *Ibid.*

* * *

Each of these examples highlights the importance of state and local participation in formulating federal regulations. As a result of input from States and localities, federal policymakers were able to avoid disastrous missteps while strengthening the bond between federal and state governments. Regrettably, however, under the *Auer* regime, federal agencies

---

[2] Available at http://static1.1.sqspcdn.com/static/f/624306/27293532/1476719964160/ADA+Accessibility+Comments_as_filed.docx.pdf?token=fUEpD9Lf6cq0kLrEswOoG2o6%2FBk%3D.

have increasingly favored unilateral action at the expense of collaboration with state and local governments.

II. The *Auer* Regime Deprives State and Local Governments of the Opportunity to Participate in Federal Policy-Making.

The APA ensures collaboration between federal agencies and state and local governments by requiring agencies to promulgate substantive regulations through notice-and-comment rulemaking. See 5 U.S.C. § 553. *Auer*, however, dangles a tempting alternative before federal regulators. Under the *Auer* regime, when agencies announce new policies through purported interpretations of already-promulgated regulations, those agencies can avoid consulting with States and localities entirely.

The consequences are profound—and profoundly dangerous. Because agency interpretations of their own regulations are often announced in briefs, letters, and memoranda—rather than developed through public, deliberative, and iterative rulemaking processes—States and localities often fail to receive notice of substantive changes to interpretations of federal laws that they enforce.

Even when States and localities are aware of an agency's new interpretation, they cannot seek the clarification and elaboration that is available through notice-and-comment rulemaking—leaving them to guess as to the meaning and application of federal law. Above all, state and local governments are deprived of the opportunity to shape federal regulations—which they are often charged with enforcing—by bringing to bear their on-the-ground knowledge

and perspectives. It is no wonder that less efficacious and more onerous regulations are often the result. And the ease with which agencies can change policies by simply reinterpreting their own regulations means that these changes happen more frequently—upsetting settled expectations and breeding uncertainty among regulated communities.

The *Auer* regime thus puts state and local governments to a Hobson's choice. They can challenge ill-considered agency interpretations in court, but this is costly and time-consuming—and under *Auer*, courts can overturn an interpretation only if it reflects an *unreasonable* reading of the regulation. Or, assuming it is even an option, state and local governments can disengage from cooperative relationships with the federal government altogether—but risk the loss of critical financial support for important public programs. Either way, they must attempt to adjust to the new scheme while preparing contingency plans should the next court ruling or the next administration rewrite the policy yet again.

These concerns are not hypothetical. Indeed, they are becoming more acute as federal agencies exploit the advantage *Auer* affords them to promulgate more and more ambiguous regulations that in turn expand their capacity to act unilaterally.

1. In 2015 and 2016, the Department of Labor under President Obama issued two interpretations that expanded the scope of "joint employment" and "independent contractor" status under the Federal Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act, based on the theory that these work relationships were being

abused to evade wage-and-hour laws. Michael J. Lotito & Ilyse Schuman, *DOL Withdraws Joint Employer and Independent Contractor Guidance* ("*DOL Withdraws*"), (June 7, 2017).[3]

Less than a year into President Trump's Administration, the Secretary of Labor rescinded those interpretations and reverted to the prior definitions of joint employment and independent contractor status. See News Release, Office of Public Affairs, *US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance* (June 7, 2017).[4] The Secretary noted that any further modifications of the standards would issue in Opinion Letters. *DOL Withdraws*, *supra*.

2. In January 2014, the Civil Rights Divisions of the Departments of Justice and Education issued a "Dear Colleague" letter addressing disciplinary practices in schools. The letter informed schools across the country that the Departments would investigate "public reports of racial disparities in student discipline," and if substantiated, those practices could be treated as a violation of federal civil-rights laws. *Joint "Dear Colleague" Letter on the Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014).[5]

---

[3] Available at http://www.littler.com/publication-press/publication/dol-withdraws-joint-employer-and-independent-contractor-guidance.

[4] Available at http://www.dol.gov/newsroom/releases/opa/opa20170607.

[5] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html.

Four years later, the same agencies rescinded the letter, explaining that "States and local school districts play the primary role in establishing educational policy," and that "the [former] Guidance and associated documents advance policy preferences and positions not required or contemplated by Title IV or Title VI." *Dear Colleague Letter* (Dec. 21, 2018).[6] It is not clear whether any States or localities were consulted before either the 2014 or 2018 guidance was issued.

3. In 1993, the Department of Labor issued several opinion letters reversing the Department's previous position that the FLSA did not require public entities to compensate career firefighters for time spent performing voluntary firefighting services for separate, non-profit corporations in the same geographic area. See *Wage and Hour Opinion Letter FLSA 2001-19* (Nov. 27, 2001).[7] The Department reversed course again in 2001, when the Acting Administrator of the Department's Wage and Hour Division opined that the FLSA does *not* require compensation for these volunteer services. *Ibid.* (acknowledging the shifting agency policy). The 1993 interpretation had resulted in staffing shortages as counties cut volunteer firefighters who were employed by the county in other professions to avoid paying additional compensation.

---

[6] Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf.

[7] Available at https://www.dol.gov/whd/opinion/FLSA/2001/2001_11_27_19_FLSA.htm.

See *Retention & Recruitment for the Volunteer Emergency Services*, at 19 (2004).[8]

4. In 2016, the Department of Commerce interpreted one of its regulations to conclude that FEMA's implementation of the National Flood Insurance Program in Oregon would jeopardize 16 endangered species, thereby compelling Oregon communities to take additional, costly measures before they would be permitted to participate in the flood insurance program. Complaint, *Oregonians for Floodplan Protection et al. v. Dep't of Commerce*, 1:17-cv-01179 (D.D.C. June 15, 2017).

5. The U.S. Army Corps of Engineers recently rescinded a 2009 interpretation making qualification for federal disaster assistance funds contingent on States and localities clearing levees of vegetation. Jeff Miller, *Army Corps Reverses Misguided Policy Requiring Clearing Trees from Levees* (Mar. 25, 2014).[9] The Corps withdrew the interpretation only after California agencies and environmental groups explained that clearing vegetation would harm endangered species, increase the risk of levee failures, and cost $7.8 billion. *Ibid.*

6. A 2005 Department of Labor interpretation respecting stipends offered by schools to staff who volunteer as coaches caused so many practical problems that some schools eliminated the stipends—or even athletics programs—entirely. Brief of *Amici Curiae*

---

[8] Available at http://www.in.gov./dhs/files/retainrecruit.pdf.

[9] Available at https://www.biologicaldiversity.org/news/press_releases/2014/levees-03-25-2014.html.

Nat'l Sch. Bds. Ass'n *et al.* at 14–19, *Purdham* v. *Fairfax Cty. Sch. Bd.*, 637 F.3d 421 (4th Cir. 2011) (No. 10-1408).

7. An informal opinion letter issued by the Department of Education in 2016 opined that Title IX requires public schools to provide students access to bathrooms based on their gender identity rather than their biological sex. See *Joint "Dear Colleague" Letter on Transgender Students* (May 13, 2016).[10] This interpretation was then invoked in a suit by a student against a school district, even though, as a coalition of States explained, that interpretation was adopted *after* the defendant school district allegedly violated it. See Brief of *Amici Curiae* the State of West Virginia, 20 Other States, and the Governors of Kentucky and Maine Supporting Petitioner, *Gloucester Cty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 2017 WL 167311 (U.S. Jan. 10, 2017). Despite the profound implications this interpretation would have on schools' obligations under Title IX—and thus their eligibility for federal education funding—those entities were not consulted. The Department withdrew the letter in 2017, explaining that "there must be due regard for the primary role of the States and local school districts in establishing educational policy." See *Joint "Dear Colleague" Letter* (Feb. 22, 2017).[11]

8. In 2013, the Ninth Circuit relied on *Auer* to uphold a position advanced by the Department of Justice in an amicus brief asserting for the first time that a

---

[10] Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[11] Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

school could fail to meet the "effective communication" requirement of the ADA, even though the school complied with the IDEA's "free and appropriate public education" requirement. See *K.M. ex rel. Bright* v. *Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013). A year later, the Department issued a "Dear Colleague" letter affirming its interpretation, again without using the notice-and-comment process. *Joint "Dear Colleague" Letter* (Nov. 12, 2014).[12]

In response, the National School Boards Association submitted to the Department roughly 30 questions left unanswered by the Dear Colleague letter—including how schools could successfully work with parents on individualized education plans if schools had to immediately meet the ADA's requirements, and how schools should judge whether an accommodation is an undue financial burden when just one communication service can cost up to $180,000 *per child*. See *NSBA Letter Re: Dear Colleague Letter Issued November 12, 2014* (Mar. 5, 2015) (inviting DOJ to join NSBA in a dialogue "[t]o avoid these potential outcomes").[13]

Had the Department promulgated its interpretation through notice-and-comment rulemaking rather than in an *amicus* brief, interested parties like NSBA would have had the opportunity to collaborate with the Department to ensure that its regulatory goals were achieved without the dislocations caused to States, localities, schools, and parents. Instead, state

---

[12] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-effective-communication-201411.pdf.

[13] Available at http://www.nsba.org/sites/default/files/file/NSBA-response-2014-DCL-Communication-Needs-3-5-15.pdf.

and local entities were blindsided by a new interpretation that required immediate adherence, imposed significant burdens, and offered little practical guidance.

All of these interpretations had far-reaching effects on state and local governments—but none of them was promulgated with any meaningful consultation with those entities. This is not how cooperative federalism is supposed to work.

III. Auer Should Be Overruled.

Notice-and-comment rulemaking lies at the heart of the APA—yet under *Auer*, an agency's interpretation offered for the first time in an *amicus* brief or an opinion letter can have the same legal force as a properly promulgated rule. See *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J. concurring). Indeed, because "[i]nterpretive rules that command deference * * * have the force of law," *id.* at 1211–12 (Scalia, J. concurring), "[t]o regulated parties, the new interpretation might as well *be* a new regulation," *id.* 135 S. Ct. at 1221–22 (Thomas, J. concurring) (emphasis added).

Auer allows the Federal Government to run roughshod over States and localities, forcing them to fall in line or else lose vital federal funds. Worse still, it allows federal *agencies*—unelected and unaccountable—to do so without so much as consulting the impacted parties. The agency need not even explain its reasoning; an *amicus* brief, a Dear Colleague letter, or even a press release all have the power to drastically shift the relationship between federal and state governments and to impose massive new burdens on States and localities. All that the agency must do is

identify a purportedly ambiguous regulation and offer an interpretation that is not arbitrary and capricious. These are hardly meaningful constraints.

First, ambiguity is often in the eye of the beholder. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2137 (2016) ("Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity."). This case is a perfect example. The Federal Circuit deferred to the Veterans Board's interpretation—advanced for the first time in this very case, Pet. 14a n.10—because it believed that the term "relevant" in 38 C.F.R. § 3.156(c)(1) was "ambiguous." *Id.* at 15a. "In our view," the Federal Circuit held, "the regulation is vague as to the scope of the word ["relevant"], and canons of construction do not reveal its meaning." *Id.*; but see *FCC* v. *AT&T Inc.*, 562 U.S. 397, 405 (2011) (looking beyond the abstract meaning of the term "personal" and considering its meaning "in light of the terms surrounding it").

Even if there were some objective standard by which parties could reliably evaluate the ambiguity of a regulation *ex ante*, that does not solve the underlying problem—the pronouncement of sweeping federal policies through hasty, ill-considered interpretations that can be modified or abandoned at the whim of unaccountable bureaucrats. Indeed, far from constraining agency action, *Auer*'s requirement that a regulation be ambiguous before an interpretation will be accorded deference only encourages agencies to promulgate ambiguous regulations at the outset. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) ("[D]eferring to an agency's interpretation of its

own ambiguous regulations * * * creates a risk that agencies will promulgate vague and open-ended regulations * * * *").

Second, the requirement that an interpretation not be arbitrary and capricious is similarly unhelpful to state and local governments charged with implementing shifting and onerous federal programs. To be sure, this may provide some safeguard "when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions." *Perez*, 135 S. Ct. at 1209. But even then, an interpretation will fail this standard only where it is "plainly erroneous or inconsistent with the regulation," *Auer*, 519 U.S. at 461 (internal quotation marks omitted)—an exceedingly difficult standard to meet.

For similar reasons, it is no answer that "Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities from liability when they act in conformance with previous agency interpretations." *Perez*, 135 S. Ct. at 1209. As an initial matter, safe-harbor provisions are hardly a universal feature of federal legislation. And even where they are present, they serve only to protect regulated entities from *retroactive* liability for noncompliance. They do nothing to relieve States and localities from the burdens of compliance on a *prospective* basis.[14]

---

[14] Of course, abandoning *Auer* would not *require* federal agencies to engage in notice-and-comment rulemaking. Agencies would still be free to issue interpretations of their regulations by other means. But courts would no longer be required to defer to those interpretations. See John F. Manning, *Constitutional*

Decades of experience demonstrate that *Auer* is fundamentally incompatible not only with separation of powers, but also with federalism. It diminishes state sovereignty by imposing costly burdens without notice to the States or the opportunity for them to be heard. It encourages the promulgation of ambiguous regulations followed by ill-considered and protean interpretations of those regulations. And in so doing it undermines the rule of law by privileging ambiguity and uncertainty over stability and predictability. It is time to abandon *Auer*.

Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 668–69 (1996) ("[I]f an agency bears the risk of its own imprecision, obfuscation, or change of heart, it will have greater incentive to draft clear, straightforward rules when it chooses to engage in rulemaking.").

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Federal Circuit and overrule *Auer*.

Respectfully submitted,

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, DC 20001

SAMUEL ECKMAN
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue
Los Angeles, California 90071

ALLYSON N. HO
Counsel of Record
KATHRYN CHERRY
BRADLEY G. HUBBARD
ELIZABETH A. KIERNAN
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

Counsel for Amici Curiae

January 31, 2019

No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

AMICUS BRIEF OF THE STATES OF UTAH, ALABAMA, ALASKA, ARIZONA, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND WEST VIRGINIA IN SUPPORT OF PETITIONER

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
STANFORD E. PURSER
Deputy Solicitor General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov

**Counsel of Record*
Counsel for Amicus Curiae State of Utah

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. *AUER* DEFERENCE UNIQUELY HARMS THE STATES 3

A. *Auer* Deference Impinges on State Sovereignty 3

B. Decisions Applying *Auer* Show Its Real-World Effects on States 11

II. THE COURT SHOULD OVERRULE *AUER* 15

A. *Auer* Was Wrongly Decided 15

B. *Stare Decisis* Considerations Do Not Save *Auer* 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Am. Corn Growers Ass'n v. EPA,
291 F.3d 1 (D.C. Cir. 2002) 14

Atascadero State Hosp. v. Scanlon,
473 U.S. 234 (1985) 10

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

B & B Hardware, Inc. v. Hargis Indus., Inc.,
135 S. Ct. 1293 (2015) 6

Bennett v. Ky. Dep't of Educ.,
470 U.S. 656 (1985) 11

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 1, 2, 18, 20

Chae v. SLM Corp.,
593 F.3d 936 (9th Cir. 2010) 12

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 16

City & Cty. of San Francisco v. Trump,
897 F.3d 1225 (9th Cir. 2018) 15

City of Arlington v. FCC,
569 U.S. 290 (2013) 5

City of New York v. FCC,
486 U.S. 57 (1988) 54

Clinton v. City of New York,
524 U.S. 417 (1998) 4

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) 1, 2, 5, 18

FCC v. Fox Television Stations, Inc.,
567 U.S. 239 (2012) 16

G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.,
822 F.3d 709 (4th Cir. 2016), *vacated and remanded on other grounds*,
137 S. Ct. 1239 (2017) 15

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 6, 17

Geier v. Am. Honda Motor Co.,
529 U.S. 861 (2000) 5, 7, 11

Gregory v. Ashcroft,
501 U.S. 452 (1991) 17

Janus v. Am. Fed. of State, Cty., & Mun. Employees, Council 31,
138 S. Ct. 2448 (2018) 19

Kimble v. Marvel Entm't, LLC,
135 S. Ct. 2401 (2015) 1

Louisiana Pub. Serv. Comm'n v. FCC,
476 U.S. 355 (1986) 4

Massachusetts v. United States,
522 F.3d 115 (1st Cir. 2008) 12, 13

Medellin v. Texas,
552 U.S. 491 (2008) 5, 6

Montejo v. Louisiana,
556 U.S. 778 (2009) 18, 19

Ohio Dep't of Medicaid v. Price,
864 F.3d 469 (6th Cir. 2017) 14

Pearson v. Callahan,
555 U.S. 223 (2009) 19

People of the State of Cal. ex rel. Dep't of Transp. v. United States, 27 Fed. Cl. 130 (1992) 14, 15

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1981) 9, 10, 17

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984) 10, 11

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015) 9, 16, 18

Phoenix Cement Co. v. U.S. EPA,
647 Fed. App'x 702 (9th Cir. 2016) 14

PLIVA, Inc. v. Mensing,
564 U.S. 604 (2011) 11

Qwest Corp. v. Colo. Pub. Utils. Comm'n,
656 F.3d 1093 (10th Cir. 2011) 13

Rosa H. v. San Elizario Indep. Sch. Dist.,
106 F.3d 648 (5th Cir. 1997) 11

Smiley v. Citibank (S.D.), N.A.,
517 U.S. 735 (1996) 5

Sossamon v. Texas,
563 U.S. 277 (2011) 10

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018) 19

State Farm Bank, F.S.B. v. Burke,
445 F. Supp. 2d 207 (D. Conn. 2006) 12

Talk America, Inc. v. Mich. Bell Tel.,
564 U.S. 50 (2011) 16, 19

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994) 9

United States v. Mead Corp.,
533 U.S. 218 (2001) 5

Wells Fargo Bank of Tex. NA v. James,
321 F.3d 488 (5th Cir. 2003) 12

Yates v. United States,
135 S. Ct. 1074 (2015) 18

CONSTITUTION, STATUTES, REGULATIONS

U.S. Const. art. I, § 3 6

U.S. Const. art. I, § 7, cl. 2 ..... 4, 5

U.S. Const. art. II, § 1, cl. 1 6

U.S. Const. art. II, § 2, cl. 2 7

U.S. Const. art. VI, § 2 4

U.S. Const. amend. XVII 7

5 U.S.C. § 553 ..... 8, 16

42 U.S.C. § 7491(b)(2)(A) 14

47 C.F.R. § 51.5 13

OTHER AUTHORITIES

The Federalist No. 17 (J. Cooke ed. 1961) 1

The Federalist No. 46 (Madison) (J. Cooke ed., 1961) 7

The Federalist No. 47 (Madison) (J. Cooke ed. 1961) 16

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 8, 9

Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737 (2004) 8

Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 Va. L. Rev. 953 (2014) 8

Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954) 7

INTEREST OF *AMICI CURIAE*

Amici curiae are the States of Utah, Alabama, Alaska, Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and West Virginia. *Amici* have a pronounced interest in cases that implicate federalism and the separation of powers.

This case fits that bill. The interpretive rule from *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), reiterated in *Auer v. Robbins*, 519 U.S. 452 (1997), uniquely harms the States. That rule requires courts to give controlling weight to a federal agency's *ad hoc* views of its ambiguous regulations—even when those views will preempt contrary State law, or retroactively change the conditions of Spending Clause legislation. *Auer* deference thus alters the balance of federal-state power and raises serious constitutional questions.

Those problems make overruling *Auer* the only tolerable outcome here. To be sure, "[o]verruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). But neither is ensuring that federal law accords States the respect due them as sovereigns. "Enough is enough." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part).

SUMMARY OF ARGUMENT

Alexander Hamilton once "confess[ed]" that he was "at a loss to discover what temptation the persons entrusted with the administration of the general government could ever feel to divest the States" of their "residuary authorities" to govern "for local purposes."

The Federalist No. 17, at 105 (J. Cooke ed. 1961). To be fair to Hamilton, he ran his agency 150 years before *Seminole Rock* absolved agency employees who yield to that lurking urge.

Seminole Rock and *Auer*, which *amici* refer to synonymously, give federal agencies a judicially created power to bind the States to *ad hoc* interpretations of their own ambiguous regulations. "The canonical formulation of *Auer* deference is that [this Court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (quoting *Seminole Rock*, 325 U.S. at 414).

But the more recent canonical statements about *Auer* have been criticisms of it. Rightly so. Time and experience have laid bare *Auer*'s faults. *Auer* allows agencies to bind the public to informal rules adopted without following the Administrative Procedure Act's (APA) strictures. That is bad for the public; they become governed by agency caprice, with no prior notice of an agency's views (or a chance to help shape them). In contrast, it's hard to think of a better deal for regulators, who can accomplish their goals free from the hassle of complying with the APA.

Fixing those problems is reason enough to overrule *Auer*. But there is more. *Auer* creates unique problems for States that also justify ditching this deference doctrine. *Auer* upsets the Constitution's finely wrought balance of federal-state power: By giving controlling weight to informal agency action that conflicts with contrary State law, *Auer* effectively expands the extent of the Federal government's power under the

Supremacy Clause, deprives States of constitutional safeguards from Federal overreach, and undermines the States' APA protections. *Auer* also allows agencies to retroactively change the terms of federal-state agreements in Spending Clause legislation. That threatens the States with the loss of vast sums—even hundreds of millions of dollars—just because of one federal employee's change of mind.

Those problems call for abandoning *Auer* deference unless *stare decisis* considerations support retaining it. They do not. *Auer* rests on *ipse dixit*, not sound reasoning; intervening events more than confirm its flaws; and it has not—and cannot—engender any legitimate reliance interests.

The Court should overrule *Auer* and reverse the judgment below.

ARGUMENT

I. *AUER* DEFERENCE UNIQUELY HARMS THE STATES.

Amici endorse Petitioner's critiques of *Auer* deference. *See* Pet'r Br. 26-45. This brief, in turn, focuses on other theoretical flaws in *Auer* deference that harm States specifically. *Amici* also discuss real-world examples of courts deploying *Auer* deference to reach results that undermine State sovereignty.

A. *Auer* Deference Impinges on State Sovereignty.

The mischief made when an agency invokes *Auer* to authoritatively interpret its own ambiguous regulations yields at least four hardships uniquely for States. First, *Auer* deference expands the Federal

government's power to preempt State law. Second, it undermines the States' political protections built into the Constitution. Third, it undercuts the States' APA protections, which decreases the States' political checks on federal lawmaking and upsets the balance of federal-state power. Fourth, it allows agencies to retroactively change conditions governing the States' receipt of federal funds from Spending Clause legislation—something not even Congress can do.

1. State laws that conflict with valid federal laws are unenforceable. U.S. Const. art. VI, § 2. States thus have an interest in ensuring that federal law arises from constitutionally prescribed procedures. *Auer* deference impairs the States' ability to vindicate that interest.

Federal legislation becomes law after both houses of Congress approve it and the President signs it (or Congress overrides a veto). U.S. Const. art. I, § 7, cl. 2; *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998). The bicameralism and presentment requirements reflect the Framers' decision that Federal legislative power should "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 439 (internal quotation marks omitted). That sole procedure is the only legislative mechanism that the ratifying States agreed would produce "the supreme law of the land," U.S. Const. art. VI, § 2, capable of displacing conflicting state law.

Even so, this Court has held that state laws may be preempted not only by duly enacted federal statutes, but also by "a federal agency acting within the scope of its congressionally delegated authority." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986);

see also, e.g., *City of New York v. FCC*, 486 U.S. 57, 64 (1988). Whatever that holding's vitality when *Congress* has expressly (or implicitly) "delegated to the agency the authority to interpret [statutory] ambiguities 'with the force of law,'" *City of Arlington v. FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)), that theory cannot justify a federal *agency's* interpretation of its own ambiguous regulation displacing state law. For even if Congress implicitly authorizes an agency to resolve any ambiguities in a statute it implements, *see, e.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996), "there is surely no congressional implication that the agency can resolve ambiguities in its own regulations," *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part).

Yet that is where *Auer* inevitably leads. State law thus gets crumped by a form of federal law at least two steps removed from any law "made in pursuance" of the Constitution's text. U.S. Const. art. I, § 7, cl. 2. *See also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) (noting that "with relative ease" agencies "can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law").

That troublesome conclusion is even more puzzling given *Auer*'s incongruity with this Court's precedent about the preemptive reach of Executive action. The President cannot arrogate to himself the power to preempt state law. *Medellin v. Texas*, 552 U.S. 491, 523-32 (2008) (holding that the President cannot preempt state law absent constitutional or statutory

authorization). It must follow that the President's administrative functionaries also cannot arrogate to themselves the power to preempt state law absent constitutional or statutory authorization. After all, "[e]xecutive agencies derive their authority from Article II of the Constitution, which vests '[t]he executive power' in 'a President of the United States.'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting) (quoting U.S. Const. art. II, § 1, cl. 1). Yet *Auer* requires courts to defer to agency action that inherently lacks statutory authorization—*even when* it preempts state law. The upshot? What *Medellin* prohibits of the principal, *Auer* expressly authorizes by his agents.

In short, *Auer* deference impinges on the bargain the States struck when they ratified the Supremacy Clause.

2. *Auer* deference also undermines the Constitution's political protections for States. "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). Indeed, the very "composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Id.* at 550-51.

For example, Article I, section 7's bicameralism requirement ensures that legislation must win the approval of the Senate, "where each State received equal representation and each Senator was to be selected by the legislature of his State." *Id.* at 551 (citing U.S. Const. art. I, § 3). More generally, the Framers believed that legislators' attachment to their

individual States would make them "disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, at 319 (Madison) (J. Cooke ed., 1961).

Even though Senators are now elected by popular vote rather than by state legislature, U.S. Const. amend. XVII, States still retain their equal representation in the Senate. And because both Senators and Representatives are elected from specific States, they have real incentives to be responsive to their constituents' varying state-specific needs and interests. *Cf.* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 547 (1954) ("To the extent that federalist values have real significance they must give rise to local sensitivity to central intervention; to the extent that such a local sensitivity exists, it cannot fail to find reflection in the Congress.").

But the States lack an analogous direct constitutional role in the composition of federal agencies. To be sure, Senators exercise advice-and-consent authority when voting on the President's nominees to agency positions. U.S. Const. art. II, § 2, cl. 2. But no officials dependent on a State's political support thereafter participate in an agency's workaday activities in any way analogous to a Representative's or Senator's involvement in the House's or Senate's daily business. Agencies thus lack the same institutional incentives to respect State interests when promulgating regulations that motivate members of Congress when they enact statutes. *See Geier*, 529 U.S. at 908 (Stevens, J., dissenting) ("Unlike Congress,

administrative agencies are clearly not designed to represent the interests of States . . . .").

Auer deference further depresses the limited agency incentives to promulgate clear rules when resolving statutory ambiguities. Under *Auer*, an agency's later, *ad hoc* views of vague regulations have the same preemptive force as formal rules. The resulting incentives favoring *informal* agency action—and the concomitant attenuation between those informal acts and statutory authority—reduce the States' chances of meaningfully influencing federal regulatory policies that directly affect their interests. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 654 (1996) (explaining that *Auer* "undermine[s] the effectiveness of external political checks on administrative agencies").

3. *Auer* also hampers the States' ability to invoke statutory procedures that safeguard their sovereignty. The APA requires agencies to promulgate substantive regulations through notice-and-comment rulemaking. *See* 5 U.S.C. § 553. When agencies comply with that requirement, States can—and do—actively participate in the notice-and-comment process to shape federal regulations that accommodate their sovereign interests and concerns. *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 Va. L. Rev. 953, 984-95 (2014) (discussing the role of the States and state interest groups in administrative proceedings); Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 777-78 (2004) (reviewing opportunities for the States to participate in the administrative process).

But *Auer* distorts agencies' regulatory incentives. It encourages them to issue ambiguous regulations that they can later interpret in less formal proceedings, free from the APA's formal constraints. Agencies thus can accomplish their regulatory goals *and* avoid the accountability contemplated by the APA's notice-and-comment requirements. *See, e.g.*, Manning, *Constitutional Structure*, 96 Colum. L. Rev. at 654 (explaining that *Auer* limits "the efficacy of rulemaking as a check upon arbitrary and discriminatory agency action"). Indeed, in light of *Auer*, "[i]t is perfectly understandable . . . for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

In short, when courts give "controlling weight" to agency interpretations of ambiguous regulations, they sanction an agency's intentional circumvention of the APA, thus "allow[ing] agencies to make binding rules unhampered by notice-and-comment procedures." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment). This deprives coordinate sovereigns of their statutory rights to mold state-sovereignty-protecting federal regulations through the notice-and-comment process.

4. *Auer* deference generates obvious tension with the Court's Spending Clause precedents.

Under the Spending Clause, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. &*

Hosp. v. Halderman, 451 U.S. 1, 17 (1981). That is because spending statutes are "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* And Congress's power to make those contracts "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'"; that is, "[t]here can . . . be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* Thus Congress may not "surpris[e] participating States with post acceptance or 'retroactive' conditions." *Id.* at 25.

That need for clarity peaks when Congress conditions receiving federal funds on the States' agreement to relinquish their historic immunity from suit. In the Eleventh Amendment context, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). This clear-statement rule recognizes "the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

Auer's deference rule creates tension with those Spending Clause precedents in at least two ways. First, because those cases require *Congress* to speak clearly as to whether the States are bound to an obligation, no basis exists for courts to give binding deference to an *agency* when Spending Clause legislation "is susceptible of multiple plausible interpretations." *Sossamon v. Texas*, 563 U.S. 277, 287 (2011). Yet *Auer* requires that course. Second, courts must defer under

Auer no matter when the agency announces its *ad hoc* views. But the *Pennhurst* canon requires that Congress provide notice of the conditions "at t[he] time" the funds are received. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 670 (1985). *Auer* deference may thus be the sole exception to the general rule that the federal government may not "modify past agreements with recipients by unilaterally issuing" new "guidelines" after the agreement has been consummated. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997).

B. Decisions Applying *Auer* Show Its Real-World Effects on States.

The harms described above are not hypothetical. Cases from around the Country reveal how the Federal government has deployed *Auer* deference to strike blows against State sovereignty.

1. Courts invoke *Auer* to preempt State law. For example, the Food and Drug Administration's views—expressed in a brief to this Court—about labeling requirements for generic drugs were a reason this Court held that Minnesota and Louisiana duty-to-warn laws were preempted. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 612-25 (2011). And this Court "place[d] some weight upon" the Department of Transportation's view, expressed in an *amicus* brief, about the preemptive scope of a Federal Motor Vehicle Safety Standard to hold that the standard preempted District of Columbia tort law. *Geier*, 529 U.S. at 883.

As expected, lower courts follow suit. The Ninth Circuit "accord[ed] . . . interpretational deference" to the Department of Education's views (expressed in an

appellate brief) about student-loan-servicing regulations. *Chae v. SLM Corp.*, 593 F.3d 936, 950 (9th Cir. 2010). It ultimately held that those regulations preempted State-law claims for fraud and breach of contract, among other things, challenging some of Sallie Mae's actions when servicing student loans. *See id.* at 948-50.

Those cases involved only private parties, but State law fares no better when the State is a litigant. The Fifth Circuit rejected the Texas Banking Commissioner's arguments, and deferred instead to an Office of the Comptroller of the Currency opinion letter, to hold that OCC regulations preempted a Texas consumer-protection banking regulation. *Wells Fargo Bank of Tex. NA v. James*, 321 F.3d 488, 494-95 (5th Cir. 2003). So too in Connecticut; when that State's Banking Commissioner's arguments about the enforceability of some of Connecticut's mortgage and banking laws conflicted with an Office of Thrift Savings opinion letter, the OTS letter prevailed and Connecticut law was preempted. *State Farm Bank, F.S.B. v. Burke*, 445 F. Supp. 2d 207, 221 (D. Conn. 2006).

2. The Federal Government also routinely invokes *Auer* deference when litigating against State governments to protect the flanks its ambiguous regulations left unguarded.

For example, Massachusetts wanted to participate as a party in license-renewal proceedings for two nuclear power plants in or near its borders. *Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008). It sought to ensure that the Nuclear Regulatory Commission accounted for its sovereign concerns about

the "treatment of spent fuel rods." *Id.* at 118. The First Circuit rejected the Commonwealth's request based on the NRC's "[d]ispositive" interpretation of its ambiguous rule governing who could participate in licensing proceedings, *id.* at 129, thereby forcing Massachusetts to try to present its safety concerns to the NRC through other administrative routes—ones that Massachusetts rightly feared "may not move quickly enough to address" its concerns before the NRC acted on those license renewals, *id.* at 127.

Or consider when Colorado tried to implement a Federal Communications Commission rule arising from the Telecommunications Act of 1996, a statute designed "to facilitate competition in the local telephone service market." *Qwest Corp. v. Colo. Pub. Utils. Comm'n*, 656 F.3d 1093, 1095 (10th Cir. 2011). Among the many FCC rules implementing that statute, one governs obligations between competing telephone companies based on the number of "business lines" an upstart company serves. *See id.* (citing 47 C.F.R. § 51.5). The Colorado Public Service Commission's view of what counted as a business line under the rule conflicted with the FCC's view, expressed in an *amicus* brief. *See id.* at 1101-02. The Tenth Circuit ultimately agreed with the FCC, but noted its "reluctan[ce] to afford such solicitude to an agency's amicus brief" and said it "would not necessarily reach the same result if not required to defer to the FCC." *Id.* at 1101.

Consider also how *Auer* deference nullified Arizona's efforts to discharge its duties under the Clean Air Act. That statute "giv[es] the states broad authority" to determine which sources of air pollution might contribute to visibility impairment—and how

best to reduce emissions from those sources. *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002); *see also id.* at 5 (citing 42 U.S.C. § 7491(b)(2)(A)). Arizona exercised that authority and concluded that a certain source's emissions could be managed using the best available reduction technology. But EPA disagreed, and the Ninth Circuit deferred to EPA because whether that source qualified for management by best available reduction technology depended on an interpretation of EPA rules. *Phoenix Cement Co. v. U.S. EPA*, 647 Fed. App'x 702, 704-05 (9th Cir. 2016); *see also id.* at 706-07 (Bybee, J., dissenting).

3. Finally, *Auer* deference inflicts harm on the States' fiscs. For instance, the Ohio Department of Medicaid asked the Centers for Medicare and Medicaid Services to amend its State Medicaid plan and allow reimbursements for services to juveniles who are pretrial detainees. *Ohio Dep't of Medicaid v. Price*, 864 F.3d 469, 472 (6th Cir. 2017). CMS denied Ohio's requested amendment, and the Sixth Circuit denied Ohio's petition for review. It held that the relevant CMS regulation "may inspire some doubt over whether juvenile pretrial detainees are barred from Medicaid coverage," so it deferred to CMS's interpretation excluding them. *Id.* at 477-78. So Ohio itself must continue to bear the costs for those services.

Similarly, the Court of Federal Claims invoked *Auer* to uphold the Federal Highway Administration's decision, based on its interpretation of its "Policy and Procedure Memoranda," to deny California's request for a supplemental contractual reimbursement of $13.8 million—funds California spent to acquire land near Sacramento for the construction of Interstate 5. *People*

of the State of Cal. ex rel. Dep't of Transp. v. United States, 27 Fed. Cl. 130, 135-41 (1992).

What is more, the Federal government now routinely tries to extend its *Auer* advantage well beyond state-by-state litigation and threaten multiple States' budgets at once. In one recent example, federal agencies sent a letter to State education officials in which they changed their interpretation of a statutory term in Title IX. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded on other grounds*, 137 S. Ct. 1239 (2017). The Fourth Circuit "accorded controlling weight" to the agencies' new position, *id.* at 723, even though this threatened the agencies' contracting State partners with the loss of hundreds of millions of dollars in educational funding. In another, the Ninth Circuit declined the Department of Justice's request "to give controlling construction" to its interpretation of an executive order that would have deprived counties in California of potentially billions of dollars in federal funds because they disagree with the Administration's immigration policies. *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1241 (9th Cir. 2018).

II. The Court Should Overrule *Auer*.

It is time to jettison *Auer*. Experience has confirmed that *Auer*'s deference rule cannot bear its own weight. And *stare decisis* considerations do not support retaining it.

A. *Auer* Was Wrongly Decided.

Auer's deference rule consistently yields results that conflict with first principles of administrative and constitutional law.

For example, where administrative law presumes that regulations "must give fair notice of conduct that is forbidden or required," *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012), *Auer* deference blesses *post hoc* agency action that gives the public *no* warning—let alone "fair warning"—"of the conduct a regulation prohibits or requires," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (internal quotation marks and brackets omitted). And where the APA presumes that the public will be bound by formal rules made through notice-and-comment procedures, *see* 5 U.S.C. § 553, *Auer* deference allows an agency's informal, *ad hoc* views "not just to advise the public, but also to bind them." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). So much for the "extensive procedural safeguards" that the States secured as part of administrative law's main "working compromise." *Fox Television Stations*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

Auer also produces results that conflict with the Constitution. The Founders viewed the separation of powers as the "political truth" of "greate[st] intrinsic value." The Federalist No. 47, at 324 (Madison) (J. Cooke ed. 1961). For were the judicial power "joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." *Id.* at 326 (internal quotation marks omitted). Yet *Auer* "permit[s] the person who promulgates a law to interpret it as well." *Talk America, Inc. v. Mich. Bell Tel.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

Equally problematic, *Auer* deference contradicts longstanding constitutional presumptions under the Supremacy Clause and the Spending Clause. First, the Federal government's power to preempt State law "is an extraordinary power in a federal system" that this Court "assume[s] Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *Auer*, however, upends that presumption when an agency is the lawmaker. An agency's *ad hoc* views of ambiguous regulations are the very embodiment of lawmaking "exercise[d] lightly"—yet *Auer* commands courts to credit them over contrary State law. Second, Congress must clearly state the terms it requires of States as a condition of receiving federal funds *before* the State agrees to them. *Pennhurst*, 451 U.S. at 17, 25. But *Auer* requires courts to defer to an *agency*'s after-the-fact views of those conditions—views the assenting States never could have known. Neither result is constitutionally sound; there is no justifiable basis for allowing courts to grant more slack to agencies who mount *ad hoc* attacks on State law, or revise the States' contracting conditions, than they grant to Congress.

Auer also incentivizes the creation of federal lawmaking via informal agency action. If more law is made that way—rather than in Congress or by formal regulatory proceedings—the States continue to lose the benefits of the Constitution's structural protections "designed in large part to protect the States from overreaching by Congress," *Garcia*, 469 U.S. at 550-51, and of their APA right to advocate their interests in notice-and-comment proceedings.

Those myriad problems should be fatal to *Auer*'s deference rule. A hypothetical example about the

canons of *ejusdem generis* and *noscitur a sociis* makes the point. If interpreting a text's ambiguous, general term in light of that text's more specific related or associated terms, *see Yates v. United States*, 135 S. Ct. 1074, 1085-87 (2015), consistently led to outcomes that flouted bedrock principles of constitutional and administrative law, not another year would pass before this Court would purge those canons from the United States Reports. The same fate is appropriate for *Auer* deference—a rule used to interpret an agency's informal views of ambiguous regulatory text.

B. *Stare Decisis* Considerations Do Not Save *Auer*.

As Petitioner explains, this Court may not even need to consider traditional *stare decisis* principles before jettisoning *Auer* deference because *Auer* is merely an "interpretive principle[]." Pet'r Br. 50 (citing *Perez*, 135 S. Ct. at 1214 n.1 (Thomas, J., concurring in the judgment)).

But even if *stare decisis* applies, not one of its factors supports retaining *Auer* deference.

Far from being "well reasoned," *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009), *Auer*'s deference rule rests solely on "*ipse dixit*," with "no justification whatsoever," *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part). *Auer* did not fill that gap; it rotely applied *Seminole Rock*. *See* 519 U.S. at 461. Nor have this Court's cases since *Seminole Rock* "put forward a persuasive justification for *Auer* deference." *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part).

Compounding that problem, the intervening years have created "a considerable body of new experience to consider regarding the consequences of requiring adherence to" an agency's *ad hoc* views. *Pearson v. Callahan*, 555 U.S. 223, 234 (2009). None of it bodes well. *See supra* at 3-18. Thus "developments since" *Auer* "was handed down" further confirm why this Court should abandon it. *Janus v. Am. Fed. of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-79 (2018).

Nor can the "reliance interests at stake," *Montejo*, 556 U.S. at 792, save *Auer*'s deference rule. "[I]mportantly, *stare decisis* accommodates only legitimate reliance interests." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018) (internal quotation marks and brackets omitted). The federal government cannot claim any legitimate reliance interest in "enact[ing] vague rules which give it the power, in future adjudications, to do what it pleases." *Talk America*, 564 U.S. at 69 (Scalia, J., concurring).

In short, *Auer* inhibits "the States from exercising their lawful sovereign powers in our federal system." *Wayfair*, 138 S. Ct. at 2096. "[T]he Court should be vigilant in correcting the error." *Id.*

CONCLUSION

The Court should overrule *Seminole Rock* and *Auer*.

Respectfully submitted.

SEAN D. REYES
Utah Attorney General
TYLER R. GREEN*
Utah Solicitor General
STANFORD E. PURSER
Deputy Solicitor General
350 N. State Street, Suite 230
Salt Lake City, UT 84114-2320
Telephone: (801) 538-9600
Email: tylergreen@agutah.gov
*Counsel of Record

Counsel for Amicus Curiae
State of Utah

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
STATE OF ALABAMA

KEVIN G. CLARKSON
Attorney General
STATE OF ALASKA

MARK BRNOVICH
Attorney General
STATE OF ARIZONA

LESLIE RUTLEDGE
Attorney General
STATE OF ARKANSAS

CHRISTOPHER M. CARR
Attorney General
STATE OF GEORGIA

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA

DEREK SCHMIDT
Attorney General
STATE OF KANSAS

JEFF LANDRY
Attorney General
STATE OF LOUISIANA

ERIC S. SCHMITT
Attorney General
STATE OF MISSOURI

DOUG PETERSON
Attorney General
STATE OF NEBRASKA

DAVE YOST
Attorney General
STATE OF OHIO

MIKE HUNTER
Attorney General
STATE OF OKLAHOMA

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA

KEN PAXTON
Attorney General
STATE OF TEXAS

PATRICK MORRISEY
Attorney General
STATE OF WEST VIRGINIA

No. 18-15

In The Supreme Court of the United States

JAMES L. KISOR,
Petitioner,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* UTILITY AIR REGULATORY GROUP IN SUPPORT OF PETITIONER

Nash E. Long, III
HUNTON ANDREWS KURTH LLP
Bank of America Plaza,
Suite 3500
101 South Tryon Street
Charlotte, NC 28280
(704) 378-4700

Elbert Lin
Counsel of Record
HUNTON ANDREWS KURTH LLP
951 East Byrd Street,
East Tower
Richmond, VA 23219
elin@HuntonAK.com
(804) 788-7202

F. William Brownell
Henry V. Nickel
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., N.W.
Washington, DC 20037
(202) 955-1500

Counsel for Amicus Curiae

January 31, 2019

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Congress gives Executive Branch agencies the power to bind regulated parties by implementing laws, not by interpreting them 4

II. This Court's application of *Chevron* deference reflects the distinction between implementation of law and interpretation of law 7

III. *Auer* ignores the line between interpretation and legislative rulemaking 11

IV. Overruling *Auer* does not require overruling *Chevron* 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Federal Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 2

Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 22

Chevron, U.S.A., Inc. v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ..... *passim*

Christensen v. *Harris Cty.*, 529 U.S. 576 (2000) 9, 16

City of Arlington v. *FCC*, 569 U.S. 290 (2013) 10

CSX Transp., Inc. v. *Ala. Dep't of Revenue*, 562 U.S. 277 (2011) 10

Decker v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) 5, 6

ExxonMobil Pipeline Co. v. *U.S. Dep't of Transp.*, 867 F.3d 564 (5th Cir. 2017) 16, 17

Gonzales v. *Oregon*, 546 U.S. 243 (2006) 9, 17

Martin v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991) 9, 20, 21

Michigan v. *EPA*, 135 S. Ct. 2699 (2015) ... 8, 9, 10, 16

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 19

Nationwide Mut. Ins. Co. v. *Darden*, 503 U.S. 318 (1992) 21

Perez v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015) 5, 6, 18

Prill v. *Nat'l Labor Relations Bd.*, 755 F.2d 941 (D.C. Cir. 1985) 19

SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 5

Strickland v. *Comm'r, Me. Dep't of Human Servs.*, 48 F.3d 12 (1st Cir. 1995) 10

Tenn. Valley Auth. v. *Hill*, 437 U.S. 153 (1978) 20

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 22

United States v. *Ameren Missouri*, No. 4:11 CV 77 RWS, 2016 WL 728234 (E.D. Mo. Feb. 24, 2016) 16

United States v. *DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013) 13, 14, 15

United States v. *DTE Energy Co.*, 845 F.3d 735 (6th Cir.), *cert. denied*, 138 S. Ct. 555 (2017) 14, 15

United States v. *Duke Energy Corp.*, 981 F. Supp. 2d 435 (M.D.N.C. 2013) 16

United States v. *Mead Corp.*, 533 U.S. 218 (2001) 21

Federal Statutes:

5 U.S.C. §§ 500 *et seq.* 7
5 U.S.C. § 551(4) 4, 5, 21, 22
5 U.S.C. § 553(b)(A) 6
5 U.S.C. § 706 18
5 U.S.C. § 706(2)(A) 7, 19
42 U.S.C. § 7411(a)(2) 11
42 U.S.C. § 7411(a)(4) 11
42 U.S.C. § 7412(n)(1)(A) 9
42 U.S.C. § 7413 11
42 U.S.C. § 7601(a) 5, 11

Federal Regulations:

38 C.F.R. § 3.156(c)(1) 12
40 C.F.R. § 52.21(a)(2)(iv)(*a*) 12
40 C.F.R. § 52.21(b)(41) 12
40 C.F.R. § 52.21(b)(41)(ii)(*a*) 12
40 C.F.R. § 52.21(b)(41)(ii)(*c*) 12
40 C.F.R. § 52.21(r)(6)(ii) 13
40 C.F.R. § 52.21(r)(6)(iii) 13
40 C.F.R. § 52.21(r)(6)(iv) 13

Federal Register:

57 Fed. Reg. 32,314 (July 21, 1992) 14

63 Fed. Reg. 39,857 (July 24, 1998) 13

Other Authorities:

Attorney General's Manual on the Administrative Procedure Act (1947) 8

Black's Law Dictionary (10th ed. 2014) 3, 5

Manning, John F., *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 17, 18, 21, 22

Opening Br. for Pl.-Appellant United States, *United States* v. *DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017) (No. 14-2274), 2014 WL 7405049 15

INTEREST OF *AMICUS CURIAE*

The Utility Air Regulatory Group (UARG) is an *ad hoc* unincorporated association of individual electric generating companies and industry groups.[1] The members of UARG own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers throughout the country. These facilities are extensively regulated under legislative rules promulgated by the U.S. Environmental Protection Agency (EPA) under the Clean Air Act (CAA). UARG's purpose is to participate on behalf of its members collectively in CAA proceedings, including rulemakings, that affect the interests of electric generators, and in litigation relating to those proceedings.

The members of UARG rely on compliance with the regulatory requirements established by EPA in legislative rules under the CAA to ensure that their actions and operations do not subject them to liability. The appropriate role of courts and Executive Branch agencies with respect to the interpretation and implementation of legislative rules is important to the members of UARG. Members of UARG have a

---

[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than UARG, its members, or their counsel made a monetary contribution intended to fund its preparation or submission.

particular interest in the validity of *Auer* v. *Robbins*, 519 U.S. 452 (1997), because, as demonstrated below, it has been cited by EPA as authority to narrow broadly-written legislative rules and retroactively impose civil liability in the billions of dollars, all under the guise of "interpreting" ambiguous rules.

SUMMARY OF ARGUMENT

Auer should be overruled because, unlike *Chevron* deference properly applied, *Auer* deference intrudes on the judiciary's Article III power to interpret the laws. Whatever other problems *Chevron* deference may have, correctly applied *Chevron* respects the constitutional line between interpretation and implementation of the laws. When Congress passes a statute, its binding meaning should be determined exclusively by judicial *interpretation*. The responsibility of Executive Branch administrative agencies is to *implement* statutes. That means agencies have discretion, where Congress has left gaps for agencies to fill, to establish policy consistent with statutory decisional standards and in compliance with statutorily prescribed procedures. A correct application of *Chevron* respects this difference between interpretation and implementation; it reserves to the judiciary the interpretation of statutory text, while giving deference only to agency rules and adjudicatory decisions that exercise delegated policy-making authority falling within the statutory bounds declared by the judiciary.

Auer deference, in contrast, fails to respect the distinction between implementation and interpreta-

tion because it gives binding deference to an agency's interpretation of ambiguous rules that carry the force of law. An "ambiguous" regulation is one where the language allows for more than one possible meaning. Black's Law Dictionary 97 (10th ed. 2014). That may be the case where there is regulatory silence on a particular question, where unclear regulatory terms have several plausible readings, or where broad language suggests intent to permit a range of outcomes. *Auer* is problematic in each of those cases, as it gives agencies the power to issue interpretations of the law that bind the judiciary.

This brief focuses on the particular problems with *Auer* in the third case: where the regulatory language suggests an intent to permit a range of outcomes consistent with the text. Good reasons may exist for an agency to write such a rule. For example, such rules can provide regulated parties flexibility in choosing how to comply, given the particular facts and circumstances that may arise. To specify one outcome from among a range of permissible outcomes is not just a purported exercise of interpretation but also is a new policy judgment to depart from the flexibility provided. In that case, *Auer* deference not only gives agencies the judicial power of binding interpretation, but it also authorizes unlawful implementation. Both results are wrong. *Auer* has been used to allow an agency to issue interpretations of rules that are given binding effect (violating the separation of powers) and to implement new policy, or change existing policy, through interpretive rules (violating the Administrative Procedure Act (APA)).

Overruling *Auer* is demanded by the checks and balances established by the Constitution, would honor the intent of Congress concerning the role of agencies under the APA, and would be consistent with decisions of this Court concerning the proper application of deference to agency discretionary policy-making.

ARGUMENT

The Court should overrule *Auer* for all the reasons stated in Petitioner's brief, but also because it blurs the distinction between interpretation and implementation of law. In particular, where rules are written to allow a range of permissible policy options, *Auer* improperly authorizes agencies to narrow those rules through interpretive statements that evade notice and comment rulemaking requirements. This brief elaborates on that problem and discusses one real-world example.

I. Congress gives Executive Branch agencies the power to bind regulated parties by implementing laws, not by interpreting them.

A critical distinction exists between implementation of the law and interpretation of the law. When Congress expressly charges an agency with execution of a statute, it delegates to that agency Congress's own authority to fill the policy gaps left in the statutory scheme, subject to certain statutory procedures and standards governing the exercise of that policy discretion. The agency may decide these unresolved matters by promulgating a legislative rule, which has the force and effect of law. See 5 U.S.C. § 551(4)

(defining "rule" as a "statement of general or particular applicability and future effect" that is designed to "implement, interpret, or prescribe law or policy"); *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'"); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947) ("The function of filling in the interstices of the Act should be performed, as much as possible, through th[e] quasi-legislative promulgation of rules . . . ."). Where authorized by statute, the agency may also develop policy through case-by-case adjudication.[2]

Interpretation of legal texts, on the other hand, is distinct from making gap-filling policy judgments. Interpretation is an act of construction—a means of resolving ambiguity in what has already been decided. See, *e.g.*, Black's Law Dictionary 943 (10th ed. 2014) (defining "interpret" as "[t]o ascertain the meaning and significance of thoughts expressed in words"); *cf. Perez*, 135 S. Ct. at 1207-08 (distinguishing the act of interpreting a regulation from the act of amending it). The purpose of interpretation is not "to make the regulatory program work in a fashion that the current leadership of the agency deems effective." *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597,

---

[2] Sometimes, Congress specifies the manner in which the agency may establish policy. In the case of the CAA, for example, Congress specified that the agency establish policy through programmatic rules. See 42 U.S.C. § 7601(a).

618 (2013) (Scalia, J., concurring in part and dissenting in part). That "is the purpose of *rulemaking*." *Id.* Rather, "the purpose of interpretation is to determine the fair meaning of the rule"—i.e., "[n]ot to make policy, but to determine what policy *has been made*." *Id.* (emphasis added). Interpretation is the job of the courts. Whatever might be said about Congress's power to delegate its own policy-making authority to administrative agencies that *implement* the laws, it certainly cannot delegate to agencies the courts' power to make binding *interpretation* of the laws.

The APA reflects this division of responsibility by distinguishing between legislative and interpretive rules. The APA requires notice and comment procedures for issuing legislative rules that *implement* a statute and have the force of law, but it excludes from those requirements *interpretive* rules that offer the agency's view on the meaning of a statute or regulation. 5 U.S.C. § 553(b)(A). See *Perez*, 135 S. Ct. at 1204 ("Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process.") (internal quotation marks omitted). An agency may issue interpretations "to *advise* the public by explaining its interpretation of the law," but an agency may not "*bind* the public by making law" without going through notice and comment rulemaking. *Id.* at 1211 (Scalia, J., concurring in the judgment).

II. This Court's application of *Chevron* deference reflects the distinction between implementation of law and interpretation of law.

Where an agency purports to fill statutory policy gaps through legislative rulemaking, courts are tasked with reviewing the substance of that legislative rule using the two-step inquiry articulated in *Chevron*. Properly understood, *Chevron* instructs that if the statute resolves the matter, then the court is to treat the issue as a question of interpretation and not give any deference to an agency's different interpretation in the rule. *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). But if the court determines that Congress delegated to the agency the policy-making authority to resolve the precise question at issue, resolution of the issue is left to agency implementation (consistent with any statutory decisional criteria identified by the court). The question then becomes whether the agency's resolution of that question "is a reasonable policy choice for the agency to make." *Id.* at 845. In other words, a policy choice authorized by statute will be upheld if not arbitrary and capricious, an abuse of discretion, or otherwise contrary to law. See 5 U.S.C. § 706(2)(A).[3]

---

[3] In addition to this substantive review of the agency's policy decision, the agency action must conform with the procedural requirements of the APA, 5 U.S.C. §§ 500 *et seq.*

Chevron deference is not to be accorded to a legal interpretation of a statute provided by an agency. Rather, it applies only to agency action implementing a policy decision delegated to it by Congress. Where "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies," the Court will not second-guess "the wisdom of the agency's policy" if the resulting agency rule makes "a reasonable choice within a gap left open by Congress." *Chevron*, 467 U.S. at 865-66. See also *Michigan* v. *EPA*, 135 S. Ct. 2699, 2718 (2015) (Kagan, J., dissenting) (*Chevron* applies "in the context of implementing policy decisions in a technical and complex arena").

Though he has other criticisms of the case, Justice Thomas has well explained how *Chevron* can properly distinguish between implementation and interpretation. "[A]gencies 'interpreting' ambiguous statutes typically are not engaged in acts of interpretation at all." *Id.* at 2712-13 (Thomas, J., concurring). "Instead, as *Chevron* itself acknowledged, they are engaged in the 'formulation of policy.'" *Id.* at 2713. Indeed, that has long been the view of the Executive Branch. See Attorney General's Manual on the Administrative Procedure Act 13-14 (1947) (rulemaking "is primarily concerned with policy considerations").

This distinction between implementation of policy and interpretation of law is borne out in numerous cases where this Court refused to extend *Chevron*

deference. *E.g.*, *Gonzales* v. *Oregon*, 546 U.S. 243, 255-56 (2006); *Christensen* v. *Harris Cty.*, 529 U.S. 576, 587 (2000) (refusing to apply *Chevron* deference to an agency opinion letter because it, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines," lacks the force of law); *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretive rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers").

In *Michigan*, for example, this Court rejected as improper "interpretation" an agency's attempt to narrow, rather than simply implement, a manifestly broad statutory provision. 135 S. Ct. at 2708. Congress had directed EPA to regulate emissions of hazardous air pollutants from power plants if the agency finds such regulation "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). "Appropriate," the Court held, is a "broad and all-encompassing term," which naturally includes consideration of all relevant factors. *Michigan*, 135 S. Ct. at 2707 (internal quotation marks omitted); *id.* at 2709 ("broad reference to appropriateness encompasses *multiple* relevant factors (which include but are not limited to cost)"). Although this formulation "leaves agencies with flexibility" in deciding how they will weigh relevant factors in determining whether regulation is "appropriate," *id.* at 2707, agencies "may not entirely fail to consider an important aspect of the problem," *id.* (internal quotation marks omitted). In implementing this provision, EPA had refused to consider cost. But

because Congress intentionally wrote the provision expansively to require consideration of all relevant factors, and cost is a relevant factor, "'[t]hat congressional election settles this case.'" *Id.* at 2710 (quoting *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 296 (2011)). *Chevron* did not give the agency license to undo that congressional election by purporting to narrowly interpret, rather than simply implement, the statutory instruction. *Id.* at 2707.

Chevron was never intended to lead to a wholesale abandonment by the courts of their ultimate authority and responsibility to interpret statutes. See *Chevron*, 467 U.S. at 843 n.9 (courts should employ all the "traditional tools of statutory construction" to resolve any statutory ambiguity). "[B]efore a court may grant [*Chevron*] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency *lawmaking* power over the ambiguity at issue." *City of Arlington* v. *FCC*, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting) (emphasis added).

Nevertheless, many lower court judges have erroneously interpreted *Chevron* to require judicial deference to an agency's interpretation of a statute whenever the statute is deemed to be ambiguous. In these cases, judicial review ends with the courts declaring that the agency interpretation is "permissible." See, *e.g.*, *Strickland* v. *Comm'r, Me. Dep't of Human Servs.*, 48 F.3d 12, 17 (1st Cir. 1995). This application of *Chevron* raises the same separation of

powers problems regarding interpretation as are raised by *Auer*. It is also a view of *Chevron* deference that is contradicted by the *Chevron* Court's careful distinction between the judiciary's responsibility to interpret a statute and an agency's policymaking responsibility under a statute as construed by the courts.

III. *Auer* ignores the line between interpretation and legislative rulemaking.

Petitioner's brief fully illustrates the many legal and practical infirmities of *Auer* deference, but this brief focuses on one in particular: the application of *Auer* to broad language in an agency regulation that, after applying the tools of textual construction, still allows for many possible outcomes. By allowing an agency via "interpretation" to specify only one of many permissible outcomes and give that interpretation binding effect, *Auer* ignores the distinction between interpretation and implementation.

One stark example is EPA's "New Source Review" (NSR) regulations under the CAA, which define when "modifications" to an existing source make it a "new" source. Under the CAA, *new* sources of air emissions must obtain certain permits prior to construction. A company that violates these requirements is subject to civil and criminal penalties. 42 U.S.C. § 7413. Under the statute, new sources include both brand new sources and existing sources that undergo "modification." *Id.* § 7411(a)(2), (4). The CAA directs EPA to define "modification" through legislative rulemaking. *Id.* § 7601(a).

The NSR rules defining a "modification" offer general guidance and no methodology for determining whether a modification has occurred. Largely mirroring the statutory language, the NSR rules define a "modification" as: "[A] project [that]. . . causes . . . a significant emissions increase . . . . The project is not a major modification if it does not cause a significant emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*).

Because permits for modifications must be obtained prior to construction, the NSR regulations require that an operator must determine preconstruction whether a project would cause a "significant emissions increase" by predicting postconstruction emissions. The rules require operators to make these predictions based on "consider[ation] [of] *all relevant information*." *Id.* § 52.21(b)(41)(ii)(*a*) (emphasis added). The rules also require that the operator exclude from this projection emissions unrelated to the project, including those due to "demand growth." *Id.* § 52.21(b)(41)(ii)(*c*). The regulations do not confine the scope of "relevant information," do not provide criteria for determining when emissions are "unrelated" to a project and must be excluded, and do not provide any methodology for making projections. *Id.* § 52.21(b)(41).[4]

---

[4] The directive for an operator to consider "all relevant information" in the NSR rules, 40 C.F.R. § 52.21(b)(41)(ii)(*a*), parallels the rule concerning "relevant" records in the case at bar, 38 C.F.R. § 3.156(c)(1). In both cases, the rules are equally broad;

Furthermore, the regulations do not require that EPA verify emission projections, that an operator wait for any response before beginning construction, or that projections be treated as enforceable limits. *Id.* § 52.21(r)(6)(ii). Rather, as EPA explained, the modification determination is:

> self-implementing and self-policing. Because there is no specific test available for determining whether an emissions increase indeed results from an independent factor such as demand growth, versus factors relating to the change at the unit, each company . . . adopts its own interpretation. Interpretations may vary from source to source, as well as from what a permitting agency would accept as appropriate.

63 Fed. Reg. 39,857, 39,861 (July 24, 1998).

In order to verify pre-construction emission projections, the NSR rules require instead that operators maintain a record of post-construction emissions of any NSR regulated pollutant and report those emissions to the relevant regulatory authority annually. 40 C.F.R. § 52.21(r)(6)(iii)-(iv). See *United States* v. *DTE Energy Co.*, 711 F.3d 643, 649 (6th Cir. 2013) (*"DTE I"*) (NSR rules are "project-and-report scheme" relying upon operator application of the regulations, rather than "prior approval scheme" re-

---

in neither case do the regulations attempt to narrow or confine "relevant."

lying upon agency application of the regulations). As EPA explained, the post-construction monitoring and reporting "provide[s] a reasonable means of determining whether a significant increase . . . resulting from a proposed change . . . occurs within the 5 years [or 10 years] following the change." 57 Fed. Reg. 32,314, 32,325 (July 21, 1992).

In the face of this broad regulatory language creating a flexible self-implementing program, EPA's Enforcement Office has initiated enforcement cases over the past two decades by claiming *Auer* deference for its post-hoc selection of a specific methodology for making pre-construction emission projections. "[D]espite the fact that the rules delegate calculation of the prediction to the operator . . . and contain no requirement that the operator obtain []EPA review or approval," EPA in these cases "deems both the operator's prediction and reality meaningless." *United States* v. *DTE Energy Co.*, 845 F.3d 735, 743 (6th Cir.), *cert. denied*, 138 S. Ct. 555 (2017) ("*DTE II*") (Batchelder, J., concurring in the judgment). In so doing, EPA's Enforcement Office has attempted to narrow the meaning of "relevant information" to that which fits its enforcement theories.

In the DTE litigation, for example, the EPA Enforcement Office relied on a methodology for pre-construction projections that was offered after construction was completed. This methodology "projected" increases in emissions, while the operator's pre-construction projections and the actual post-

construction emissions showed decreases. *DTE I*, 711 F.3d at 648.

Following dismissal of the enforcement action by the district court, EPA appealed to the Sixth Circuit, arguing that *Auer* required deference to its projection methodology. Opening Br. for Pl.-Appellant United States at 21, 57, *United States* v. *DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017) (No. 14-2274), 2014 WL 7405049. A fractured panel of the Sixth Circuit reversed, issuing three separate opinions. *DTE II*, 845 F.3d at 736-41, 741-45, 745-56. As Judge Batchelder explained, the approach advanced by EPA's Enforcement Office allowed EPA to rely upon "its own expert's preconstruction predictions," using an unpublished projection methodology, in an attempt "to force DTE to get [an NSR] construction permit (or to punish DTE for failing to get [an NSR] permit), even if []EPA's disagreement is based on debatable scientific or technical reasons and even if actual events have proven []EPA's expert's prediction wrong." *Id.* at 744 (Batchelder, J., concurring in the judgment).

The Government's position in the *DTE* litigation plainly illustrates how EPA in an enforcement action has attempted to use *Auer* to narrow, and amend through purported interpretation, a regulatory regime designed to be flexible. On their face, the NSR rules do not specify any methodology for preconstruction projections. At the time of their adoption, EPA expressly recognized that the rules allowed a multiplicity of approaches. And recognizing this potential for different approaches to projecting future

emissions, EPA made post-construction reporting of *actual* emissions the basis for NSR enforcement and compliance, avoiding debates over preconstruction projection methodologies. Yet EPA has sought to turn the regulatory flexibility created by the use of broadly-worded provisions into an ambiguity to be resolved under *Auer*. See also, *e.g.*, *United States* v. *Ameren Missouri*, No. 4:11 CV 77 RWS, 2016 WL 728234, at *16 n.22 (E.D. Mo. Feb. 24, 2016) (holding that Government's interpretation of NSR regulations gets *Auer* deference); *United States* v. *Duke Energy Corp.*, 981 F. Supp. 2d 435, 463 (M.D.N.C. 2013) (same).

Where the tools of textual construction lead to the conclusion that a rule's language allows a range of different methods for compliance, the agency should not be permitted to revisit that policy judgment by limiting the rule to one exclusive method and then demand *Auer* deference to this "interpretation." This is true whether the law exists as statute, see *Michigan*, 135 S. Ct. at 2707, or whether it exists as legislative rule. See *Christensen*, 529 U.S. at 588 (to defer to an agency interpretation that eliminates flexibility built into the regulation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation"). The elimination of flexibility enshrined in the regulations represents a new policy choice and thus requires the agency to employ the same procedures used to produce the prior decision: notice and comment rulemaking. See, *e.g.*, *ExxonMobil Pipeline Co.* v. *U.S. Dep't of Transp.*, 867 F.3d 564, 575-78 (5th Cir. 2017)

(vacating portions of agency enforcement order that attempted to second-guess a regulated party, where the underlying regulation required that the party only consider various factors and did not specify the result).

The Court applied these principles in *Gonzales* v. *Oregon*, where the Court refused to give *Auer* deference to the Attorney General's attempt to narrow the meaning of a broadly worded rule through interpretation. 546 U.S. 243 (2006). The Attorney General announced that broad regulatory language defining lawful conduct could be narrowed through interpretation to exclude a specific type of conduct. *Id.* at 253-54. The Court rejected the Government's argument for deference to what was actually an attempt at implementing a new policy judgment. *Id.* at 256. Because the regulatory language "gives no indication how to decide this issue, the Attorney General's effort to decide it now [via the interpretive rule] cannot be considered an interpretation of the regulation." *Id.* at 257. In short, interpretation cannot substitute for the decision-making process established by the APA for formulating binding rules. Filling gaps or narrowing a broad regulation requires new rulemaking.

Because *Auer* deference has allowed agencies to work substantive policy changes by narrowly "interpreting" broad regulatory language that allows many possible outcomes, it should be overruled. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*,

96 Colum. L. Rev. 612, 638 (1996) (identifying the "separation of lawmaking from law-exposition" as a "crucial constitutional commitment" that *Seminole Rock* deference contradicts). Once an agency makes a decision and implements that policy choice through rulemaking, binding interpretation of that law lies with the courts alone. See, *e.g.*, 5 U.S.C. § 706 ("[T]he reviewing court shall . . . interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."); *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (the APA "contemplates that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations").

For legislative rules that regulate conduct, the courts should simply employ the tools of textual construction and enforce rules according to their terms. The judiciary's interpretive function is first to determine whether the rule's language speaks with only one plausible meaning or is ambiguous. In the latter case, the judiciary should apply canons of construction to resolve or to narrow the scope of any ambiguity. *Cf. Chevron*, 467 U.S. at 843 n. 9 (requiring courts to apply the tools of statutory construction to narrow or resolve ambiguity at step one). Where ambiguity nevertheless remains, the courts must recognize that the rule as written allows a range of outcomes. This result preserves the courts' constitutional responsibility to "say what the law is," respects the constitutional role of the Executive Branch agencies to implement policy under decision-

al standards established by Congress, and assures compliance with the APA.

IV. Overruling *Auer* does not require overruling *Chevron*.

To overrule *Auer* does not require also overruling *Chevron*, if the latter is properly understood and applied. First, whatever other constitutional issues *Chevron* may raise, it does not intrude on the judiciary's power of interpretation in the same way as *Auer*. See *Chevron*, 467 U.S. at 865-66. In its first step, *Chevron* requires courts to exercise their traditional role of interpreting statutes to determine the degree to which Congress has already addressed the question at issue. *Id.* at 845. This includes determining the scope of policy discretion provided the agency to address an unresolved issue. See, *e.g.*, *Prill* v. *Nat'l Labor Relations Bd.*, 755 F.2d 941, 956-57 (D.C. Cir. 1985) (setting aside agency action taken on the basis of the agency's incorrect view of the scope of its discretion under the statute); *cf. Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (agency rule must be "within the scope of the authority delegated to the agency by statute"). In its second step, *Chevron* requires courts to decide whether the agency action resolving the issue represents "a reasonable policy choice for the agency to make," *Chevron*, 467 U.S. at 845—in other words, is the result arbitrary and capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2)(A). This is consistent with separation between the judi-

ciary and the political branches, as *Chevron* itself explained:

> [A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Chevron, 467 U.S. at 865-66 (quoting *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 195 (1978)). *Auer*, on the other hand, directly intrudes on the judiciary's power of interpretation, as explained above.[5]

---

[5] To the extent that any legal justification has been supplied for *Auer*, it is the faulty premise that Congress has delegated to the agency authority to construe its own regulations. See, *e.g.*, *Martin*, 499 U.S. at 151 ("we presume that the power authorita-

Second, overruling *Auer* is consistent with the animating purpose of *Chevron*: encouraging the development of policy through notice-and-comment rulemaking. *Chevron* deference is premised on Congress's delegation of authority to an agency to give content to ambiguous statutory language through legislative rules. See *United States* v. *Mead Corp.*, 533 U.S. 218, 226 (2001). Notice-and-comment rulemaking, when properly followed, ensures that the agency proposes how it is implementing the statute, explains its rationale, considers public comments, and then promulgates the new legislative rule with prospective effect. 5 U.S.C. § 551(4). *Chevron* deference thereby serves the due process objectives of giving notice of the law to those who must comply and of constraining those who must enforce it. See Manning, 96 Colum. L. Rev. at 623-27, 638-39, 660-62.

Application of *Auer* to allow an agency to make a significant change in the meaning of a regulation years after the rule was promulgated, as was done in the NSR context, represents the antithesis of *Chevron* deference. *Chevron* deference anticipates that agencies will resolve policy delegations after providing notice and an opportunity to be heard, and that

---

tively to interpret its own regulations is a component of the agency's delegated lawmaking powers"). But Congress cannot delegate what it does not possess. "[T]he Constitution invests the Judiciary, not the Legislature, with the final power to construe the law." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 325 (1992).

the agency's resolution will be subject to meaningful judicial review. Deference to shifting agency interpretations of a regulation promotes just the opposite result: vague regulations that have no fixed meaning. *Id.* at 655-60; *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting). This carries the risk of unfair and retroactive application of new regulatory mandates to activities completed long ago, raises due process concerns and is in direct contravention of the statutory requirement that a rule be "an agency statement of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis added). See also *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law.").

CONCLUSION

The Court should overrule *Auer*, and make clear that in the context of legislative rules that regulate conduct, the rule must be implemented and enforced according to its terms. Where a rule employs broad terms that allow a range of potential outcomes, an agency cannot narrow the rule—eliminating compliance options—without further notice and comment rulemaking.

Respectfully submitted,

Nash E. Long, III
HUNTON ANDREWS KURTH LLP
Bank of America Plaza, Suite 3500
101 South Tryon Street
Charlotte, NC 28280
(704) 378-4700

Elbert Lin
Counsel of Record
HUNTON ANDREWS KURTH LLP
951 East Byrd Street, East Tower
Richmond, VA 23219
elin@HuntonAK.com
(804) 788-7202

F. William Brownell
Henry V. Nickel
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave., N.W.
Washington, DC 20037
(202) 955-1500
Counsel for Amicus Curiae

January 31, 2019

No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CORBIN K. BARTHOLD
Counsel of Record
CORY L. ANDREWS
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
cbarthold@wlf.org

January 31, 2019

QUESTION PRESENTED

Whether the Court should overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

AUER ENCOURAGES AN AGENCY TO TEST THE BOUNDARIES OF ITS POWER; TO GRAB AUTHORITY OUTSIDE ITS AREA OF EXPERTISE; TO SHIFT POSITIONS UNPREDICTABLY; TO BYPASS NOTICE-AND-COMMENT RULEMAKING; TO SPURN DEMOCRATIC LEGITIMACY; AND TO HARASS DISFAVORED GROUPS 7

A. The Board of Immigration Appeals 7

B. The Department of Labor 9

C. The Environmental Protection Agency 11

D. The Department of Education 13

E. The Federal Trade Commission 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases:

Appalachian Power Co. v. EPA,
208 F.3d 1015 (D.C. Cir. 2000) 11, 12, 13

Arlington v. FCC,
569 U.S. 290 (2013) 16

Auer v. Robbins,
519 U.S. 452 (1997) ..... *passim*

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 4

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 1, 9, 10

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) 5

G.G. ex rel. Grimm v. Gloucester Cnty. School Bd.,
822 F.3d 709 (4th Cir. 2016) 15

Gutierrez-Brizuela v. Lynch,
834 F.3d 1142 (10th Cir. 2016) 1

Indep. Training & Apprenticeship Prog. v. Cal. Dep't of Indus. Relations,
730 F.3d 1024 (9th Cir. 2013) 10

Marbury v. Madison,
1 Cranch 137 (1803) 1

Nat'l Min. Ass'n v. McCarthy,
758 F.3d 243 (D.C. Cir. 2014) 11

Page(s)

Perez v. Mortgage Bankers Assoc.,
135 S. Ct. 1199 (2015) 1, 11

Sandifer v. U.S. Steel Corp.,
678 F.3d 590 (7th Cir. 2012) 10

Soundboard Assoc. v. FTC,
888 F.3d 1261 (D.C. Cir. 2018) 18, 19

Soundboard Assoc. v. FTC,
Case No. 18-722 (U.S.) 16

Talk Am., Inc. v. Mich. Bell Tel. Co.,
564 U.S. 50 (2011) 5

Texas v. United States,
201 F. Supp. 3d 810 (N.D. Tex. 2016) 15

Zhou Hua Zhu v. U.S. Attorney General,
703 F.3d 1303 (11th Cir. 2013) 7, 8

Statutes and Regulations:

5 U.S.C. § 553(b) 11

15 U.S.C. § 6102(a)(1) 16

20 U.S.C. § 1681 14

29 U.S.C. § 203(k) 9

29 U.S.C. § 213(a)(1) 9

8 C.F.R. § 1003.1(d)(3) 8

16 C.F.R. § 310.4(b)(1)(v) 17

34 C.F.R. § 106.33 15

38 C.F.R. § 3.156(a) 3

38 C.F.R. § 3.156(c)(1) 3, 4

Page(s)

38 C.F.R. § 3.156(c)(3) 3

38 C.F.R. § 3.400(q) 3

Miscellaneous:

Cynthia Barmore, *Auer in Action: Deference After* Talk America, 76 Ohio St. L.J. 813 (2015) 5, 7

Cynthia Barmore, *An Empirical Analysis of Auer Deference in the Courts of Appeals*, 36 Yale J. on Reg.: Notice & Comment, https://perma.cc/G6WG-C863 (Sep. 13, 2016) 5

Karen Blumenthal, *The Truth About Title IX*, The Daily Beast, https://perma.cc/MV6K-RQJB (June 22, 2012) 14

Lisa Shultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461 (2003) 5

The Federalist No. 78 ..... 1, 2

Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* (2018) 18

Montesquieu, *The Spirit of the Laws* 1

U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts*, https://perma.cc/Z99C-28TB (Apr. 4, 2011) 14

Page(s)

U.S. Department of Education, *Sexual Harassment: It's Not Academic*, https://perma.cc/UG7A-RJCU (Sept. 2008)..... 14

U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, https://perma.cc/2LW7-RQ26 (Feb. 22, 2017) 16

Letter from U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, to Royce Engstrom and Lucy France, University of Montana, https://perma.cc/RU9Z-GPHJ (May 9, 2013) 14

INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has appeared as *amicus curiae* before this Court in important administrative-law cases. See, e.g., *Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199 (2015); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

"There is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (A. Hamilton) (quoting 1 Montesquieu, *The Spirit of the Laws* 181). The principal judicial power is, of course, the power to "say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). What would happen if the legislative and executive branches could wield this power? "They might be tempted to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). "Parties who cannot alter their past conduct" would then be left "to the mercy of majoritarian"—or, worse, bureaucratic—"politics." *Id.* "Unpopular groups," in particular, would likely "be singled out for this sort of mistreatment." *Id.*

---

[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. All parties have consented to the brief's being filed.

Auer v. Robbins, 519 U.S. 452 (1997), brings these fears to life. It instructs the judiciary in most instances to adopt, as binding law, the executive's interpretation of its own regulations. It enables an executive agency, flush with power delegated by the legislature, to issue open-ended rules, and then to contort those rules as it sees fit. This is not a hypothetical problem. As we shall see, agencies use their *Auer* privileges to seize power, to shift policy haphazardly, to evade democratic checks and balances, and to pick on unpopular groups. Regulated entities cope as best they can. But they "have every thing to fear" from the judiciary's "union," through *Auer*, with "the other departments." The Federalist No. 78.

WLF urges the Court to overturn *Auer*.

STATEMENT OF THE CASE

James Kisor served as a Marine in the Vietnam War. He saw combat. In December 1982, contending that that combat had given him post-traumatic stress disorder (PTSD), he filed a claim for service-connected disability benefits with the Department of Veterans Affairs (VA). Pet. App. 2a. A counselor declared that Kisor displayed symptoms associated with PTSD. *Id.* A psychiatric examiner concluded, however, that Kisor suffered not from PTSD, but from a "personality disorder"—a condition that does not qualify a veteran for benefits. *Id.* at 3a. Finding insufficient evidence that Kisor suffered from PTSD, the VA Regional Office (RO) denied the claim in 1983. *Id.*

In June 2006 Kisor reasserted his claim. He submitted, among other things, (1) a new psychiatric evaluation stating that he suffers—and has suffered, since at least the 1980s—from PTSD and (2) documents confirming that he partook in combat operations in Vietnam. Pet. App. 3a-4a; J.A. 38-40. Finding that Kisor suffers from PTSD, the RO awarded benefits.

There are two main ways the VA can grant a renewed claim. First, under 38 C.F.R. § 3.156(a), the VA may "reopen" a claim to consider "new and material evidence." This is what the RO did in Kisor's case, using the new psychiatric evaluation. But when a claim is reopened under § 3.156(a), benefits accrue from the day the veteran filed the renewed claim. *Id.* § 3.400(q). The RO therefore granted Kisor benefits effective June 2006.

Second, under 38 C.F.R. § 3.156(c)(1), the VA may "reconsider" a claim if it receives or finds "relevant official service department records" that existed, but were not considered, when the claim was denied. If the VA grants benefits under § 3.156(c)(1), benefits accrue from "the date the entitlement arose or the date [the] VA received the previously decided claim, whichever is later." *Id.* § 3.156(c)(3). In Kisor's case this would shift the accrual of benefits back to December 1982, when Kisor filed his original claim.

Kisor contends that the documents confirming his combat experience are "relevant official service department records" that trigger § 3.156(c)(1). Pet. App. 12a-13a. The government disagrees. It argues that the documents are not "relevant" records, because Kisor's combat experience was not a point of

dispute when the VA denied Kisor's claim in 1983. *Id.* at 13a. The Board of Veterans' Appeals, the Veterans Court, and the Federal Circuit sided with the government.

This appeal revolves around the Federal Circuit's use of *Auer*, 519 U.S. 452, to adopt the government's reading of the word "relevant" in § 3.156(c)(1). Under *Auer* (and its predecessor, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)), a court defers to an agency's interpretation of its own ambiguous regulation, so long as that interpretation is not "plainly erroneous or inconsistent with the regulation" itself. 519 U.S. at 461. A Federal Circuit panel concluded that the word "relevant," as used in § 3.156(c)(1), is ambiguous; and that the government's reading—under which "relevant" means, not "relevant to an element of the veteran's claim," but "relevant to the outcome of the dispute"—was neither plainly erroneous nor inconsistent with the regulation. Pet. App. 17a-19a. So the panel applied the government's narrow reading of "relevant . . . records"; declared that Kisor's documents, which confirmed his combat experience but shed no light on his PTSD, were not "relevant"; and declined to shift the accrual of benefits back to December 1982.

The full court of appeals denied rehearing *en banc*. Judges O'Malley, Newman, and Moore dissented. They based their dissent on a canon of construction not at issue in this appeal. Along the way, though, they paused to observe that "several justices of the Supreme Court recently have urged their colleagues to abandon *Auer*." Pet. App. 48a. *Auer*, they explained, "encourages agencies to write

ambiguous regulations and interpret them later," which "defeats the purpose of delegation, undermines the rule of law, and ultimately allows agencies to circumvent the notice-and-comment rulemaking process." *Id.* at 49a (quoting Lisa Shultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 551-52 (2003)).

SUMMARY OF ARGUMENT

"Questions of . . . *Auer* deference arise as a matter of course on a regular basis." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Roberts, C.J., concurring). That is not a good thing. Judging from how often courts reject an agency's bid for deference—for many agencies the rejection rate is above thirty percent—*Auer* disputes arise with such frequency because agencies regularly try the limits of their authority. Cynthia Barmore, *Auer in Action: Deference After* Talk America, 76 Ohio St. L.J. 813, 830-31 (2015) (cataloguing agencies' *Auer* success rates).

"Common concerns about *Auer* [deference]," one defender of *Auer* contends, "have not materialized in practice." Cynthia Barmore, *An Empirical Analysis of Auer Deference in the Courts of Appeals*, 36 Yale J. on Reg.: Notice & Comment, https://perma.cc/G6WG-C863 (Sep. 13, 2016). This, however, is incorrect. All too often, an agency seeks to exploit any source of power at hand. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) ("The seeming inappropriateness of *Auer* deference is especially evident in cases such as these, involving an agency that has repeatedly been rebuked in its

attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends.").

This brief offers concrete examples of agencies' efforts aggressively to expand, or abruptly to alter, the import of their regulations. Agencies suddenly and radically change how they interpret rules—and then seek deference for those new interpretations. Agencies seek deference for their interpretations of rules unconnected with their areas of expertise. Agencies try to stretch the meaning of rules beyond the scope even of the statutes that give agencies the power to regulate in the first place. Under the guise of rule "interpretation," agencies dodge notice-and-comment procedures, defy democratic norms, and undermine the very notion of equal justice under law.

When these abuses are challenged in court, *Auer* deference is not always the central issue. Sometimes the agency argues that its action is not even subject to judicial review. Sometimes the court concludes that the agency improperly used "interpretation" as a vehicle to create a whole new rule. What is clear, however, is that agencies try to expand their dominion at almost every turn, and that *Auer* emboldens them in their wanton arrogations of power.

Auer surely generates both costs and benefits. Sadly, however, a major cost—indeed, a ruinous cost—arises from its constant abuse. Agencies use *Auer* as cover for highhanded, unpredictable, and nakedly political behavior. *Auer*, therefore, should go.

ARGUMENT

AUER ENCOURAGES AN AGENCY TO TEST THE BOUNDARIES OF ITS POWER; TO GRAB AUTHORITY OUTSIDE ITS AREA OF EXPERTISE; TO SHIFT POSITIONS UNPREDICTABLY; TO BYPASS NOTICE-AND-COMMENT RULEMAKING; TO SPURN DEMOCRATIC LEGITIMACY; AND TO HARASS DISFAVORED GROUPS.

What follows is by no means an exhaustive review of *Auer*-fueled agency mischief. The examples below have been selected (1) to capture the conduct of a variety of distinct agencies and (2) to illustrate several distinct problems that *Auer* creates, promotes, or exacerbates.

A. The Board of Immigration Appeals.

The government frequently invokes *Auer* when defending a decision of the Board of Immigration Appeals (BIA); yet the courts reject almost forty percent of the government's interpretations of its own immigration rules. Barmore, supra, 76 Ohio St. L.J. at 830-31. This failure rate suggests that the government often uses *Auer* to defend shifting, extreme, or untenable readings of immigration regulations.

An arresting example of such *Auer* abuse appears in *Zhou Hua Zhu v. U.S. Attorney General*, 703 F.3d 1303 (11th Cir. 2013). An immigrant from China, Zhu, fathered three children while in the United States. During his removal proceeding, he contended that he would, if sent back to China, be

forcibly sterilized for violating China's one-child policy. The immigration judge (IJ) granted Zhu's application for asylum. The BIA reversed, however, in an opinion that reviewed *de novo* the IJ's findings of fact on the likelihood that China would forcibly sterilize Zhu.

The BIA's standards of review are set forth in a regulation, 8 C.F.R. § 1003.1(d)(3). The regulation states that "the Board will not engage in *de novo* review of findings of fact," and that it shall review such findings only for clear error. *Id.* The government sought *Auer* deference for the BIA's conclusion that, § 1003.1(d)(3) notwithstanding, the BIA may independently weigh evidence about the likelihood of a future event. 703 F.3d at 1308.

In issuing § 1003.1(d)(3), the Department of Justice intended to adopt the federal courts' standard of review for findings of fact. 703 F.3d at 1309-10. Yet, as *Zhu* observes, the BIA's use of *de novo* review for "future" facts "fl[ew] in the face of centuries of common-law adjudication." *Id.* at 1310. *Zhu* reviews a "wide variety of contexts" in which courts treat a prediction as a finding of fact. *Id.* at 1310-11. *Zhu* then joins four other circuits in rejecting the BIA's attempts to review findings about future events *de novo*. *Id.* at 1312-14.

Auer stands in large part on the notion that a court should defer to an agency's expertise. As *Zhu* illustrates, however, the government is not averse to using *Auer* merely to rationalize its defense of a patently unreasonable position.

B. The Department of Labor.

Some agencies struggle to interpret their regulations consistently and coherently. The Department of Labor (DoL) is a prime offender.

Consider *Christopher*, 567 U.S. 142. The Fair Labor Standards Act (FLSA)—that is, the federal wage-and-hour law—exempts from its ambit a worker "employed . . . in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). The FLSA defines a "sale" to include any "exchange" or "other disposition." *Id.* at § 203(k). In the 1930s and 1940s the DoL issued regulations that incorporated the "outside salesman" exemption.

In the late 2000s enterprising plaintiffs' attorneys began suing drug manufacturers, on behalf of pharmaceutical sales representatives, for unpaid wages under the FLSA. They argued that, because sales reps do not literally sell pharmaceuticals—they merely convince doctors to agree to prescribe them—they fall outside the "outside salesman" exemption. The DoL "had acquiesced in the sales practices of the drug industry for over seventy years," 567 U.S. at 153; but in 2009, in "an uninvited *amicus* brief" filed in an appeal, *id.* at 152, it declared that the FLSA governs pharmaceutical sales reps. It sought, in effect, to expose the pharmaceutical companies to "potentially massive liability" for "conduct that occurred well before" its "interpretation was announced." *Id.* at 156.

The DoL did not offer a consistent explanation for its new position. In the courts of appeals, it

argued that a "sale" requires a "consummated transaction." *Id.* at 154. But, apparently realizing that pharmaceutical sales reps' work satisfies this definition, it argued before this Court, in *Christopher*, that a "sale" requires a transfer of property. *Id.* This (new) new reading, however, was "flatly inconsistent" with the definition of "sale" in the FLSA itself (recall that definition's use of the term "other disposition"). *Id.* at 159. Still, the DoL sought *Auer* deference for its position. *Id.* at 154-55. Concluding that the DoL had "unfair[ly] surprised" its regulated entities, the Court declined to go along. *Id.* at 156.

The DoL's shifting approaches often bear no connection to its area of expertise. The DoL fails, in other words, to tie its about-faces "to any institutional knowledge of labor markets possessed by the Department's staff." *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 599 (7th Cir. 2012). Its "oscillation[s]" appear to arise, rather, from raw "politics." *Id.* The courts of appeals have (not surprisingly) "come together in spurning" the DoL's "gyrating agency letters." *Id.*; see also *id.* ("All that the [Obama] Department has contributed to our deliberations . . . is letting us know that it disagrees with the position taken by the Bush Department").

Again, *Auer* stands in part on the premise that agencies can apply specialized knowledge. But the DoL frequently fails to display, or use, such knowledge. See, e.g., *Indep. Training & Apprenticeship Prog. v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1034 (9th Cir. 2013) ("[T]he DOL's new interpretation is nearly as

difficult to decipher as the underlying regulation it seeks to interpret.").

C. The Environmental Protection Agency.

An agency is allowed to issue an "interpretive" rule—as opposed to a more substantive "legislative" rule—without conducting notice-and-comment procedures. 5 U.S.C. § 553(b). "But this concession to agencies was meant to be more modest in its effects than it is today." *Perez*, 135 S. Ct. at 1211 (Scalia, J., concurring). Thanks to *Auer*, "agencies may now use [interpretive] rules not just to advise the public, but also to bind them." *Id.* at 1212.

The inquiry into whether an agency rule is "legislative" or "interpretive" is "quite difficult and confused." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (Kavanaugh, J.). If maintaining democratic legitimacy were one of its principal aims, an agency would, when in doubt, conduct notice and comment. But *Auer* encourages an agency simply to proceed by diktat through a memorandum or guidance letter. An agency can argue that it is not making a new rule, but merely exercising its wide discretion to "interpret" an old one. The vaguer the regulation, of course, the more room the agency has for such "interpretation."

Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000), illustrates the point. Under the Clean Air Act, a company must obtain a permit to operate a stationary source of air pollution. The permitting process has been assigned to the States. Congress directed the EPA, however, to issue

regulations setting the minimum requirements of each State's process. The EPA issued these regulations in 1992. The regulations directed the States to ensure that each permit requires periodic monitoring of a stationary source's emissions. If a background state or federal rule already required such monitoring, incorporating that rule into the permit constituted compliance with the 1992 regulations. In 1998, however, the EPA issued a memorandum entitled "Periodic Monitoring Guidance." The memorandum ordered each State, before granting a permit, to assess whether monitoring was needed *in addition* to the monitoring required by an extant state or federal rule.

The EPA's "guidance" memorandum drastically expanded the scope of the regulations it purported to "interpret." "Nothing" in the underlying regulations, the D.C. Circuit observed, "said anything about giving State authorities a roving commission" to supplement "State and federal [monitoring] standards." 208 F.3d at 1026. The EPA had promised, moreover, in its 1992 rulemaking, that "if federal standards were found to be inadequate in terms of monitoring," it "would open [new] rulemaking proceedings." *Id.* In issuing the "guidance" memorandum, the court noted, the EPA had broken its promise. *Id.* The EPA's "guidance" memorandum was in fact a whole new rule, one the EPA had tried to issue without going through notice and comment. The court therefore set it aside. *Id.* at 1028.

Although it does not itself discuss *Auer*, *Appalachian Power* contains an incisive description of the process that *Auer* facilitates:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

208 F.3d at 1020. Skip the notice and comment, *Auer* suggests. Just issue a memo. A court might accept it as an "interpretation" owed deference.

Auer invites an agency to explore the frontiers of notice-and-comment-free "interpretive" rulemaking.

D. The Department of Education.

Auer also entices administrators to view themselves, not as trustees of authority delegated by Congress, but as philosopher kings empowered to govern as they see fit.

Take, for example, how the Department of Education (DoE) has applied Title IX. In 1972 Congress passed, and President Nixon signed, a law declaring that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681. The idea was to stop schools from applying gender quotas or excluding girls from advanced classes, after-school clubs, and the like. See Karen Blumenthal, *The Truth About Title IX*, The Daily Beast, https://perma.cc/MV6K-RQJB (June 22, 2012).

Reading the law expansively, however, the DoE has claimed for itself the power to regulate student-on-student behavior, to impose detailed codes of conduct, and to lower the burden of proof in schools' grievance hearings. See, e.g., Letter from U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, to Royce Engstrom and Lucy France, University of Montana, https://perma.cc/RU9Z-GPHJ (May 9, 2013); U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts*, https://perma.cc/Z99C-28TB (Apr. 4, 2011); U.S. Department of Education, *Sexual Harassment: It's Not Academic*, https://perma.cc/UG7A-RJCU (Sept. 2008).

In 2015 the DoE went a step farther, ordering schools to allow students to use the bathroom that matches their gender identity. In 1975, however, the DoE's predecessor had issued an implementing regulation governing bathrooms. A school, this

regulation says, "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Several schools argued that this regulation permits them to allocate bathroom access based solely on biological sex.

It is fanciful to suppose that in the 1970s, when Title IX was passed and the implementing regulation was issued, "sex," as used in this context, meant anything other than "biological sex." See *G.G. ex rel. Grimm v. Gloucester Cnty. School Bd.*, 822 F.3d 709, 736 (4th Cir. 2016) (Niemeyer, J., dissenting), vacated, 137 S. Ct. 1239 (2017). Still, the DoE sought *Auer* deference for its conclusion that "sex," as used in the 1975 regulation, includes gender identity. In the courts this argument yielded mixed results. Compare *G.G.*, 822 F.3d 709 (upholding the DoE's interpretation, even though it is "perhaps not the intuitive one"), with *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (rejecting the DoE's interpretation, because "it cannot be disputed that the plain meaning of the term sex," at the time of the regulation's passage, was "the biological and anatomical differences between male and female . . . as determined . . . at birth"). Clearly, though, the government's position was untenable without *Auer* deference.

The point is not that a given code of conduct, a given burden of proof, or a given bathroom policy is bad. The point, rather, is that *Auer* has helped an agency push, at every opportunity, to expand its authority. It is for the people's representatives in Congress, not unelected civil servants, to resolve

major policy disputes. Under *Auer*, however, a citizen "can perhaps be excused for thinking that it is the agency really doing the legislating." *Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

It bears noting that in 2017 the DoE rescinded its bathroom guidance. Its decrees defining "sex" to include "gender identity" did not, it wrote, "contain extensive legal analysis or explain how the position is consistent with the express language of Title IX"; nor, it conceded, "did they undergo any formal public process." U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students*, https://perma.cc/2LW7-RQ26 (Feb. 22, 2017). So the DoE's policy on school bathrooms is an instance of *Auer*-enabled vacillation to boot.

E. The Federal Trade Commission.

A petition for certiorari pending before the Court, *Soundboard Association v. FTC*, Case No. 18-722 (U.S.), provides another vivid example of the sort of regulatory whiplash that can occur under *Auer*.

Congress directed the Federal Trade Commission (FTC) to issue rules for the telemarketing industry. "The Commission," it said, "shall prescribe rules prohibiting deceptive . . . or . . . abusive telemarketing acts or practices." 15 U.S.C. § 6102(a)(1). Exercising its delegated authority, the FTC issued the Telemarketing Sales Rule (TSR), which, among other things, bans telemarketing calls

at odd hours. In 2008 the FTC added to the TSR some rules governing robocalls. The new rules ban most "outbound telephone call[s]" that deliver "a prerecorded message" without the recipient's written consent. 16 C.F.R. § 310.4(b)(1)(v).

"Soundboard" technology enables a telemarketer to interact with a call recipient using prerecorded clips. The telemarketer can play scripted questions and responses; but she can also enter the call and speak for herself. A telemarketing company asked the FTC whether its use of soundboard technology violated the 2008 TSR amendments. The FTC responded, in a 2009 staff opinion letter, that the amendments "do not prohibit" soundboard-assisted calls.

Over the next few years the FTC received complaints that companies were abusing soundboard technology by, for example, having telemarketers use the technology to conduct many calls at once. Rather than ban the specific abuses, however, the FTC in 2016 issued a staff opinion letter that rescinded the 2009 letter. The new letter declares that soundboard technology falls within the "plain language" of the robocall ban.

A trade group sued to enjoin enforcement of the 2016 letter. The group argued, among other things, that the letter announces a legislative rule that should have been put through notice and comment. The district court rejected this argument. The D.C. Circuit declined to reach it; it concluded that the 2016 letter—which, like most such letters, emphatically asserts a position but disclaims any binding effect—is not a final agency action subject to

review. As Judge Millett noted in dissent, however, the letter "speaks in final, conduct-altering, and compliance-demanding terms." *Soundboard Assoc. v. FTC*, 888 F.3d 1261, 1280 (D.C. Cir. 2018) (Millett, J., dissenting). The letter "leaves the soundboard industry whipsawed between abandoning its business and facing potentially ruinous enforcement actions and penalties." *Id.* at 1284.

"Businesspeople crave certainty as much as almost anything: certainty allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018). Issue a reliable, stable rule and, even if it is not the rule a company would have wanted, the company will adjust. Had the FTC in 2009 interpreted its regulation to ban soundboard technology, telemarketing companies would no doubt have made do. Instead the FTC invited those companies to invest in soundboard technology, then pulled the rug from under them seven years later. The FTC could provide shifting readings of its rule, knowing that even an unreliable interpretation often enjoys *Auer* deference.

Auer invites an agency cavalierly to change the meaning of its regulations. It gives an agency the space to rotate its position 180 degrees—to "condemn[] as illegal an entire business model," 888 F.3d at 1284 (Millett, J.)—in a mere staff opinion letter.

It is no accident, moreover, that the parties in the examples we have seen include pharmaceutical companies, pollutant emitters, and telemarketers. It is when dealing with unpopular groups that an

empowered regulator will feel least obliged to act consistently and with restraint. "The pride of our legal system is its evenhandedness and fairness to all who come before it." *Id.* at 1285 (Millett, J.). The fact that *Auer* assists agencies in singling out disfavored groups for special (poor) treatment is yet another strike against it.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

CORBIN K. BARTHOLD
Counsel of Record
CORY L. ANDREWS
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
cbarthold@wlf.org

January 31, 2019

No. 18-15

In The Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT WILKIE, ACTING SEC. OF VETERANS AFFAIRS.

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Federal Circuit

BRIEF OF *AMICUS CURIAE* SENATOR SHELDON WHITEHOUSE IN SUPPORT OF RESPONDENT

Sen. Sheldon Whitehouse
Counsel of Record
Hart Senate Office Bldg., Rm. 530
Washington, DC 20510
(202) 224-2921
counsel@whitehouse.senate.gov

Jason P. Steed
KILPATRICK TOWNSEND
& STOCKTON LLP
2001 Ross Ave., Ste. 4400
Dallas, TX 75201
(214) 922-7112
jsteed@kilpatricktownsend.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

THIS CASE IS THE PRODUCT OF A SUSTAINED EFFORT TO DISABLE PUBLIC INTEREST REGULATION THAT THIS COURT SHOULD REJECT. 2

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Austin v. Mich. Chamber of Commerce 494 U.S. 652 (1990).....14

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).....17

Bond v. United States, 564 U.S. 211 (2011).....5

Citizens United v. FEC, 510 U.S. 310 (2010).....17, 19

Clippinger v. Hepbaugh, 5 Watts & Serg. 315, 1843 WL 5037 (Pa. 1843).....16

Fuller v. Dame, 18 Pick. 472 (Mass. 1836).....16

Gross v. FBL Financial Servs., Inc., 556 U.S. 167 (2009).....17

Harris v Roof's Executor, 10 Bar. 489, 1851 WL 5268 (N.Y. Gen. Term. 1851).....15

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).....17

Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).....6

Marshall v. Baltimore & Ohio Railroad Co., 57 U.S. 314 (1853).....14, 15

McCutcheon v. FEC, 134 572 U.S. 185 (2014).....17, 18

McDonnell v. United States, 136 S. Ct. 2355 (2016).....17

Rent-A-Center, West, Inc., v. Jackson, 561 U.S. 63 (2010).....17

Rose v. Truax, 21 Barb. 361 (N.Y. Gen. Term. 1855) 15

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062 (7th Cir. 1997) 12

Shelby County v. Holder, 570 U.S. 529 (2013) 20

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1901) 6

Trist v. Child, 88 U.S. 441 (1874) 14, 15

Univ. of Texas Southwestern Med. Center v. Nassar, 570 U.S. 338 (2013) 16

Vance v. Ball State Univ., 570 U.S. 421 (2013) 16

Walmart v. Dukes, 564 U.S. 338 (2011) 16

Wood v. McCann, 6 Dana 366 (1838) 15

Other Authorities

3 William Blackstone, *Commentaries on the Laws of England* (1st ed. 1768) 16

Alexis de Tocqueville, *Democracy in America* (Arthur Goldhammer trans., Penguin Putnam 2004) (1838) 16

Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) 3

Benjamin I. Page, Larry M. Bartels, & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 Perspectives on Politics 1 (2013) 4

Cass R. Sunstein & Adrian Vermuele, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297 (2017) 2, 8, 9

Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (1748) 4

Counting the Cost of Energy Subsidies: IMF Survey, https://www.imf.org/en/News/Articles/2015/09/28/04/53/sonew070215a (last visited February 28, 2019) 7

David Hume, *Philosophical Works of David Hume* (1854) 3

Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017) 2, 10

Gillian Metzger, *Symposium: The Puzzling and Troubling Grant in* Kisor, Scotusblog (Jan. 30, 2019), https://www.scotusblog.com/2019/01/symposium-the-puzzling-and-troubling-grant-in-kisor/ 2, 8, 9

Grover Cleveland, State of the Union address, 1888, American Presidency Project 6

J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J. of L. & Pol. 239 (2017) 7

Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 Notre Dame L. Rev. 1599 (2018) 8

James Boswell, *The Life of Samuel Johnson, LL.D* (1791) 9

Jamie Weinstein, *This Election Was a Great Opportunity for Republicans. Instead, the GOP Lies Broken*, The Guardian (Nov. 8, 2016) 11

Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (2016) 8

Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. Times Magazine (Aug. 22, 2018) 12

Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking 'the Administrative State'*, N.Y. Times (Mar. 26, 2018) 12

Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015) 16

Joel Heller, *Shelby County and the End of History*, 44 U. Mem. L. Rev. 357 (2013) 20

Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 Colum. L. Rev. 915 (2018) 10

Josh Barro, *Fact-Free Conservative Media Is a Symptom of GOP Troubles, Not a Cause*, Business Insider (Oct. 24, 2016) 11

Keith Werhan, *Principles of Administrative Law* (2008) 9

Larry Bartles, *Economic Inequality and Political Representation*, Princeton Univ. Dept. of Politics (2002), http://princeton.edu/~piirs/events/PU%20comparative%20Conf%20May%202007/20Gilnes.pdf 5

Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It* (2011).....4

Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012).....4

Michael E. Levine, *Regulatory Capture*, in 3 The New Palgrave Dictionary of Economics and the Law (Peter Newman ed., 1998).....9

Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1 (2012).....19

Nancy MacLean, *Democracy in Chains* (2017).....10

Niccolo Machiavelli, *The Prince* (1532).....3

Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 Law & Soc. Inquiry 955 (2007).....12

Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008).....12

Robert Barnes & Steven Mufson, *White House counts on Kavanaugh in battle against 'administrative state'*, Wash. Post (Aug. 12, 2018).....13

Sheldon Whitehouse, Afterword to Daniel Carpenter and David A. Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (2014).....9

The Federalist No. 78 (A. Hamilton) (C. Rossiter ed. 1961).....5

Theodore Roosevelt, "The Annual Message of the President Transmitted to Congress, December 3, 1907," *Papers Relating to the Foreign Relations of the United States* (Washington, DC: Government Printing Office, 1910) 6

Theodore Roosevelt, *New Nationalism Speech* (1910)..... 4

Thomas B. Edsall, *After Citizens United, a Vicious Cycle of Corruption*, N.Y. Times (Dec. 6, 2018).....18, 19

Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, The Atlantic (July 10, 2018).....20

thing these actors want is a robust, operating democracy that honors the wishes of the people.[8] What they want is political power, and the secrecy to deploy it without accountability.[9]

Congress set up administrative agencies to balance the interests of the public against the self-interest of these powerful forces. In our complex, modern economy, Congress does not have the time to address the multiplicity and variety of issues that come before these agencies; Congress also lacks the expertise to address the complex and often technical questions raised;[10] and Congress is often under too much political pressure to address these questions

---

[8] And the stakes can be huge. For example, in the United States alone the fossil fuel industry enjoys an annual effective subsidy of nearly $700 billion, according to the International Monetary Fund. *See Counting the Cost of Energy Subsidies: IMF Survey*, https://www.imf.org/en/News/Articles/2015/09/28/04/53/sonew070215a (last visited February 28, 2019).

[9] The corporate forces operating in politics today are rarely actually the corporations themselves, and more often corporate trade associations, corporate-funded "think-tanks," the billionaires of vast fortunes garnered through corporate success, and an army of front groups designed to obscure the sources of their funding.

[10] *See* J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J. of L. & Pol. 239, 241 (2017) ("[I]t is difficult to legislate in minute detail upon intricate and technical subjects where the body of knowledge is changing and growing by the day. As a practical matter, the legislative process just cannot keep up.").

reliably in the public interest,[11] particularly in the present dark-money-driven, post-*Citizens-United* era.[12]

So Congress built administrative agencies that have both the time and expertise to balance public and private interests knowledgeably; and built into these agencies a bulwark of protections to assure they would do so fairly: statutory direction, congressional oversight, judicial review, procedural transparency, public notice and comment, and rules encouraging sound, fair and evidence-based decision-making.[13]

For decades, it has all worked remarkably well. The challenge presented by this case is a solution in

---

[11] *See* Metzger, *Symposium*, *supra* note 2 ("Independent agencies serve a critical role in regulating businesses and marketplaces because they are able to enact reasonable business regulations without political interference or the undue influence of corporate influence."); Sunstein & Vermuele, *supra* note 2, at 321 ("In the absence of a clear congressional direction, courts have assumed that because of their specialized competence, and their greater accountability, agencies are in a better position to decide on the meaning of ambiguous terms. That assumption is correct.").

[12] *See* Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* 206 (2016) (calculating that between 1999 and 2015, as much as $750 million was redistributed through dark-money shell entity DonorsTrust to various conservative causes).

[13] *See* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 Notre Dame L. Rev. 1599, 1604 (2018).

Nevertheless, in academic institutions and think tanks funded by these powerful influencers, a hothouse plant of anti-regulatory theory has been seeded, watered, and fertilized.[16] In political lobbying

---

When they do, the consequences can be grave. From the Minerals Management Service, whose failures and shocking behavior led to the oil spill in the Gulf, to the Securities and Exchange Commission, asleep at the switch as financial services companies created exotic financial products that took our economy to the brink of collapse, the fruits of capture can be poisonous. Although too rarely discussed, the economic concept of regulatory capture is well established. From Woodrow Wilson in 1913, through Marver Bernstein, the first Dean of the Woodrow Wilson School at Princeton University in 1955, to Nobel-prize-winning economist George Stigler, to the editorial page of The Wall Street Journal today, Americans from across the political spectrum have recognized its threat. With the stakes as high as they are, it is no wonder that regulated industries make remarkable efforts to affect agencies' decisions.").

[16] *See, e.g.*, Nancy MacLean, *Democracy in Chains* 216, 239 (2017) (giving specific examples of corporate, anti-regulatory forces supporting academics and think tanks in their efforts to undermine economic security or social justice gains and instigate environmental misinformation campaigns); Metzger, *1930s Redux*, *supra* note 2, at 33 ("These academic moves reflect a longer-term and more lasting development. They are part of a wider and decades-old effort to reset constitutional law in a conservative and libertarian direction, reflected in the work of conservative legal groups like the Federalist Society and the Institute for Justice. As that suggests, there is a mutually reinforcing relationship between judicial and academic attacks on the administrative state."); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 Colum. L. Rev. 915, 952–53 (2018) ("And so, the conservative movement began a

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is United States Senator Sheldon Whitehouse of Rhode Island. As a legislator and member of the Senate Committee on the Judiciary, *amicus* has a front-row view of both the virtues of America's constitutional democracy and the hazards of growing corporate influence over its democratic institutions, including the judiciary. *Amicus* files this brief to provide some practical, political, and historical context for what is going on in this case.

SUMMARY OF ARGUMENT

Administrative agencies perform a key role in the constellation of American government, protecting the public from forces of immense political power and influence. They bring a special combination of technical substantive expertise, focused persistence and adaptiveness in face of complex problems, and relative independence from raw political pressure. Obviously, this will annoy forces of influence for whom the deployment of raw political power confers immense advantage. The Court should be wary of

---

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution to its preparation or submission.

upsetting this decades-old balance to the advantage of those forces of influence. They may prosper by incrementally moving the arena of decision to an overwhelmed, technically inexpert and politically malleable Congress, or to equally inexpert courtrooms, but the public would pay the price.

ARGUMENT

This Case Is the Product of a Sustained Effort to Disable Public Interest Regulation That This Court Should Reject.

This case comes before the Court as part of a larger strategy to disable public interest regulation, as a "stalking horse for much larger game."[2] It must

---

[2] Cass R. Sunstein & Adrian Vermuele, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297, 298 (2017) ("The argument in favor of independent judicial judgment reflects an emerging, large-scale distrust of the administrative state."); *see also* Gillian Metzger, *Symposium: The Puzzling and Troubling Grant in* Kisor, Scotusblog (Jan. 30, 2019), https://www.scotusblog.com/2019/01/symposium-the-puzzling-and-troubling-grant-in-kisor/ ("The court's insistence on taking up a broad challenge to *Auer*, in a case lacking the hallmarks of *Auer* abuse, suggests that its decision to hear *Kisor* is best understood as part of a growing constitutional attack on administrative governance evident in Roberts Court jurisprudence."); *see also* Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017) ("Eighty years on, we are seeing a resurgence of the

be seen in the larger context of the age-old contest between powerful influencers who seek to bend government to their will, and a general public that counts on government to protect it from the influencers.

There is an elemental tension in a democracy (as in other forms of government) between two classes of citizens. One class is an influencer class that occupies itself with favor-seeking from government, and therefore desires rules of engagement that make government more and more amenable to its influence. The second class is the general population, which has an abiding institutional interest in a government with the capacity to resist that special interest influence.[3]

---

antiregulatory and antigovernment forces that lost the battle of the New Deal.").

[3] This is a centuries-old tension. *See* David Hume, *Philosophical Works of David Hume* 290 (1854) ("Where the riches are in a few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose . . . to make the richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of the Government."); Niccolo Machiavelli, *The Prince* ch. IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that

The influencer class is no proxy for the public; it has distinct interests, often divergent from the interests of the general population, when it deploys its powers and pressures.[4] There is a need to resist the influencer class because the big influencers stand apart not only in their interests, but also in the power they wield throughout our democratic institutions.[5]

---

of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed."); Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* Book V (1748) ("To men of overgrown estates, everything which does not contribute to advance their power and honor is considered by them as an injury."); Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of an effective state, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power.").

[4] *See* Benjamin I. Page, Larry M. Bartels, & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 Perspectives on Politics 1, 51, 67 (2013) (summarizing results of a study finding that wealthy Americans are much more concerned about budget deficits and much less concerned about job programs, social welfare programs, financial regulation and education programs than other Americans).

[5] *See* Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012) (explaining that the country's policymakers respond almost exclusively to the preferences of the economically advantaged); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It* 143-47 (2011) (noting that dependency on donors causes Congress to spend more time on issues that matter to

The Court will hear a lot about separation of powers in this case, but the very purpose of that principle is to protect the public from abuse of government power, including abuse by influencers who seek to control or manipulate that power.[6] In this day and age, the influencers tend to be the big banks and financial houses of Wall Street, the large-scale polluters, and major industries like pharmaceuticals,

---

their funders than to the general public); *see generally* Larry Bartles, *Economic Inequality and Political Representation*, Princeton Univ. Dept. of Politics (2002), http://princeton.edu/~piirs/events/PU%20comparative%20Conf%20May%202007/20Gilnes.pdf ("In almost every instance, senators appear to be considerably more responsive to the opinions of affluent constituents than to the opinions of middle-class constituents, while the opinions of constituents in the bottom third of the income distribution have *no* apparent statistical effect on their senators' roll call votes.").

[6] Writing on the intended independence of the judiciary, for example, Hamilton observed that the "independence of judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government . . . ." The Federalist No. 78 (A. Hamilton) (C. Rossiter ed. 1961); *see also Bond v. United States*, 564 U.S. 211, 222, (2011) ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.").

technology and insurance (in earlier days it was mills and railroads—the players change but the game remains the same). Their power can be immense, and has been immense throughout our history.[7] Whether it is a firearms industry seeking to prevent any regulation of its deadly weapons, or a fossil fuel industry protecting its massive pollution, or Wall Street protecting tax favors for its titans, or a pharmaceutical industry defending an island of high U.S. drug prices from world competition, the last

---

[7] *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 83 (1901) (Harlan, J., concurring in part and dissenting in part) ("[T]he conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country."); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting) ("There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations."); Grover Cleveland, State of the Union address, 1888, American Presidency Project ("Corporations, which should be carefully restrained creatures of law and the servants of people, are fast becoming the people's masters."); Theodore Roosevelt, "The Annual Message of the President Transmitted to Congress, December 3, 1907," *Papers Relating to the Foreign Relations of the United States*, congressional ed vol. 5270, issue 1 (Washington, DC: Government Printing Office, 1910) ("The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign—that is, to the Government, which represents the people as a whole—some effective power of supervision over their corporate use.").

search of a problem.[14] As a public official I get virtually zero complaints about the existence of this so-called "administrative state." Indeed, if there is any recurring complaint about administrative agencies it is the well-documented phenomenon of "agency capture," when the regulated industry comes to dominate its supposed regulator and ignore the public interest.[15]

---

[14] *See* Metzger, *Symposium*, *supra* note 2 ("The absence of evidence of *Auer*'s supposed ills is par for the course . . . there is little empirical support for the fear that *Auer* will incentivize vague regulations."); Sunstein & Vermuele, *supra* note 2, at 309-10 ("[W]hen ambiguity exists, it is rarely because of *Auer*. After all, few people who are involved in writing regulations think a great deal about *Auer*; many of them have absolutely no idea what *Auer* is . . . . There is a palpable lack of realism, and a lack of empirical grounding, to the widespread concern that *Auer* is a significant part of the constellation of considerations that lead agencies to speak specifically or not . . . . The critics speak abstractly of possible abuses, but present no empirical evidence to substantiate their fears."); *id.* at 312, 318 ("The simplest answer to this question is that there is no problem to be fixed. Nothing is broken."); James Boswell, *The Life of Samuel Johnson, LL.D* 202 (1791) (quoting Samuel Johnson: "Human experience, which is constantly contradicting theory, is the great test of truth").

[15] *See, e.g.*, Michael E. Levine, *Regulatory Capture*, in 3 The New Palgrave Dictionary of Economics and the Law 267, 267 (Peter Newman ed., 1998); Keith Werhan, *Principles of Administrative Law* 7 (2008); *see also* Sheldon Whitehouse, Afterword to Daniel Carpenter and David A. Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (2014) ("As we've seen too often, wealthy and powerful industries can gain excessive influence over regulatory agencies.

groups and industry trade associations funded by these powerful influencers, the hothouse plant is shopped to the public and politicians.[17] And through

---

massive institution-building effort across a number of spheres, an effort whose trajectory one might usefully trace from the creation of the Heritage Foundation and the Cato Institute in 1973 and 1977, respectively, through the 1996 launch of the Fox News Channel .... Many of the new think tanks and foundations were the result of an infusion of capital from wealthy, mobilized advocates of deregulation.").

[17] A striking admission of how this big-money fixery works was written by *Business Insider*'s Josh Barro, a Republican who interned for Grover Norquist, worked at the conservative Manhattan Institute for Policy Research, and left the party in disgust over Trump. Just before the 2016 election, Barro wrote: "If [conservatives] look honestly enough, they will realize the conservative information sphere has long been full of lies. The reason for this is that lying has been the most effective way to promote many of the policies favored by donor-class conservatives, and so they built an apparatus to invent and spread the best lies." They have "built a network of think tanks and magazines and pressure groups funded by wealthy donors whose job was to come up with arguments that would sell the donor-class agenda to the masses." Josh Barro, *Fact-Free Conservative Media Is a Symptom of GOP Troubles, Not a Cause*, Business Insider (Oct. 24, 2016). For "donor-class," read influencer class. As conservative commentator and author Jamie Weinstein wrote on election day in 2016: "As for the Republican primary electorate, we learned that perhaps they don't care so much about conservative principles after all—that the conservative movement may be nothing more than a collection of magazines and offices and think tanks in Manhattan and Washington, DC." Jamie Weinstein, *This Election Was a Great Opportunity for Republicans. Instead, the GOP Lies Broken*, The Guardian (Nov. 8, 2016).

amicus groups funded by these powerful influencers, it is shopped to judges and has now been presented to this Court.[18] It is a complete artifice, from beginning to end. And it appears be directed at judges appointed through a political nominations process favoring this view.[19]

---

[18] This case is no exception. *Amici* in support of petitioner at both the certiorari and merits stage include many of the Court's frequent flyers—the U.S. Chamber of Commerce, Southeastern Legal Foundation, Pacific Legal Foundation, Washington Legal Foundation, Atlantic Legal Foundation, the Beacon Center, to name a few—backed by (to the extent their funders are known at all) a common set of influential mega-donors. *See generally* Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008); Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 Law & Soc. Inquiry 955 (2007); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) ("The term 'amicus curiae' means friend of the court, not friend of a party. We are beyond the original meaning now; an adversary role of an *amicus curiae* has become accepted. But there are, or at least there should be, limits.").

[19] *See, e.g.*, Jeremy W. Peters, *Trump's New Judicial Litmus Test: Shrinking 'the Administrative State'*, N.Y. Times (Mar. 26, 2018) ("With surprising frankness, the White House has laid out a plan to fill the courts with judges devoted to a legal doctrine that challenges the broad power federal agencies have to interpret laws and enforce regulations, often without being subject to judicial oversight. Those not on board with this agenda, the White House has said, are unlikely to be nominated by President Trump."); Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. Times Magazine (Aug. 22, 2018) ("The originalists and textualists now favored by

It should go without saying that big, regulated industries with enormous political clout and public-relations savvy may prefer a time-burdened, inexpert, and politically malleable Congress to knowledgeable and patient regulators adherent to rule-of-law principles of fairness and factuality. But for the public, this would be a bad outcome.

There was a time when the United States Supreme Court took the health of America's polity seriously, and affirmatively sought to defend the integrity of the political process. To the question whether the Court bears any responsibility for the health of the American body politic or is merely a bystander when corruption rears its head, the Court's answer was once evident in word and deed. Over and

---

the Federalist Society and the Trump administration are decidedly disinclined to defer to executive-branch agencies, whether it's the Environmental Protection Agency or the Food and Drug Administration or the Occupational Safety and Health Administration, when it comes to interpreting arguably (and often necessarily) ambiguous statutes about the environment or public health or workplace safety . . . . Gorsuch is said to have risen to the top of Trump's Supreme Court list in large part because of a 2016 concurring opinion he wrote as a judge on the United States Court of Appeals for the 10th Circuit, in which he forcefully attacked what's known as "Chevron deference."); Robert Barnes & Steven Mufson, *White House counts on Kavanaugh in battle against 'administrative state'*, Wash. Post (Aug. 12, 2018) ("'Judge Kavanaugh protects American businesses from illegal job-killing regulation,' the memo [from the White House] said. 'Judge Kavanaugh helped kill President Obama's most destructive new environmental rules.'").

over, the Court's concerns with corruption entwined with the potentially malevolent political influence of large corporate forces—as recently as Justice Marshall's recognition in *Austin v. Michigan Chamber of Commerce* that "[c]orporate wealth can unfairly influence elections."[20]

The Court once had a particular awareness of the dangers to honest governance posed by massive corporate forces.[21] The Court then saw clearly that

---

[20] 494 U.S. 652, 660 (1990). Indeed, in case after case through the early 19th century, the Court sought to defend the political system from "personal or any secret or sinister influences." *See Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. 314, 335-36 (1853) ("[A]ny attempts to deceive persons entrusted with the high functions of legislation by secret combinations . . . or to create or bring into operation undue influences of any kind, have all the injuries of a direct fraud on the public."); *see also Trist v. Child*, 88 U.S. 441, 451 (1874) (citing to *Baltimore & Ohio Railroad Co.* and other cases as representative of existing precedent and consensus in U.S. courts that "tainted" contracts must be void as against public policy).

[21] To demonstrate the gravity of the danger of corruption threatened by undue corporate influence, the Court once provided a striking example: "If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous." *Trist v. Child*, 88 U.S. at 451. This outcome, the Court warned, would be "vicious" and "to be condemned," presenting "evils of . . . sufficient magnitude to invite the most serious consideration." *Id.* The Court once

bringing "the combined capital of wealthy corporations" to bear on government could produce "universal corruption."[22] To protect against this, the Court condemned "[i]nfluences secretly urged under false and covert pretenses," and forbade any scheme of "high contingent compensation" of agents seeking legislative gains.[23] The link between money, secrecy, influence and corruption was plain, and its consequences were seen by the Court to be drastic for democracy: "[s]peculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every state, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome -- *omnae Roma venale*."[24]

---

recognized "the great corporations of the country" as the very exemplars of the hazards of political mischief and the intrusion of "the combined capital of wealthy corporations" into politics as the gilded pathway to "universal corruption." *Id.* at 451-52.

[22] *Baltimore & Ohio Railroad Co.*, 57 U.S. at 335.

[23] *Id.*

[24] *Id.*; *see also Rose v. Truax*, 21 Barb. 361, 373 (N.Y. Gen. Term. 1855) ("public policy demands that her legislators . . . discharge the important trusts and duties committed to them independently, uninfluenced by any illegitimate or sinister agencies"); *Harris v Roof's Executor*, 10 Bar. 489, 495, 1851 WL 5268 (N.Y. Gen. Term. 1851) ("It can be neither necessary or proper for the legislature to be surrounded by swarms of hired retainers of the claimants upon public bounty or justice."); *Wood v. McCann*, 6 Dana 366, 369 (1838) ("[T]he Legislature should be perfectly free from any extraneous influence which may either

In recent years, this Court's jurisprudence has massively shifted power to the forces of influence. For instance, the Court has protected these great powers from exposure to courtrooms and juries, the elements of the American system of government specifically set up to check their powers of influence.[35]

---

corrupt or deceive the members, or any one of them."); *Shippinger v. Hepbaugh*, 5 Watts & Serg. 315, 1843 WL 5037, at *14 (Pa. 1843) (noting that influences "privately and secretly exerted . . . operate deleteriously on legislative action"); *Fuller v. Dame*, 18 Pick. 472, 486 (Mass. 1836) (discussing issues surrounding attempt to keep certain agreements "secret" from the individuals who would be impacted by the agreement).

[35] Unique in the constitutional constellation, the jury is designed not just to protect the individual against government, but also to protect the individual against other "more powerful and wealthy citizens"; the jury box is designed to frustrate the influencers, and to offer a refuge when the influencers have had their way with the other branches of government. 3 William Blackstone, *Commentaries on the Laws of England* 380 (1st ed. 1768); *see also* Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times (Oct. 31, 2015); Alexis de Tocqueville, *Democracy in America* 311 (Arthur Goldhammer trans., Penguin Putnam 2004) (1838) (describing the jury as "one mode of popular sovereignty"). Recent decisions, however, have empowered giant corporations through mandatory arbitration to shunt plaintiffs away from civil juries. The Court has opened the door for giant corporations to contractually debar customers from pursuing class actions. In various employment discrimination cases, the Court has steadily whittled away the rights of corporate employees. *See, e.g., Vance v. Ball State Univ.*, 570 U.S. 421 (2013); *Univ. of Texas Southwestern Med. Center v. Nassar*, 570 U.S. 338 (2013); *Walmart v. Dukes*, 564 U.S. 338 (2011); *AT&T Mobility LLC v.*

The Court has also made it nearly impossible to prosecute any but the most obvious, immediate and amateurish efforts at political corruption, which widens the lane for forces of influence to work their will with money, threats, and promises without fear of legal consequence.[26]

If that were not enough, the Court has opened America's political system to unlimited political spending, which, in turn, opened up unlimited anonymous political spending, and which empowered the obvious corollary to unlimited political spending:

Concepcion, 563 U.S. 333 (2011); *Rent-A-Center, West, Inc., v. Jackson*, 561 U.S. 63 (2010); *Gross v. FBL Financial Servs., Inc.*, 556 U.S. 167 (2009); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

[26] *See, e.g.*, *Citizens United v. FEC*, 510 U.S. 310, 359 (2010) ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); *McCutcheon v. FEC*, 134 572 U.S. 185, 207-208 (2014) ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance."); *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (vacating the conviction of a former Virginia Governor in a case involving allegations of a *quid pro quo* arrangement where the former Governor's constituent gave the Governor and his family over $175,000 of value in gifts and loans in exchange for giving the constituent access to top Virginia government decision-makers). Some relationships may be so sordid that they merit condemnation as corruption under the criminal law, yet not be reachable under this Court's narrow definition limiting corruption to precisely '*quid pro quo*' transactions where the payee is the actual decision maker.

promises and threats of unlimited political spending.[27] This drives political power to a narrow array of forces that have both the means and the desire to spend unlimited political money (the forces rationally least deserving of special solicitude in America's political contests).[28]

---

[27] "Citizens United has unleashed a wave of campaign spending that by any reasonable standard is extraordinarily corrupt," and "has turned campaign finance into a system . . . even more ethically unmoored than the one obtained before Watergate . . . . The difference now is that the checks are bigger." Thomas B. Edsall, *After Citizens United, a Vicious Cycle of Corruption*, N.Y. Times (Dec. 6, 2018).

[28] In many of these cases, *amici* also present in this case were urging these results. Their funding is not disclosed because the Court's transparency rule is helpless at ferreting out who the real parties in interest are behind "front" *amici*, but there is every reason to believe that it is the big influencers mentioned above who funded those efforts and are funding this effort, too. In this regard, the statement in *McCutcheon* that "those who govern should be the *last* people to help decide who *should* govern," *McCutcheon*, 572 U.S. at 192 (emphasis added), is sadly blinkered. It stands on no evident constitutional footing but seems rooted in opinion; it deprecates the work of the Founders to create a balanced, self-correcting, elected republic, and their confidence that in a healthy republic good people would come forward to serve; it overlooks the role of the voter in putting out of office "those who govern" who displease them; and it is bad political theory, as it overlooks the pernicious role of big and powerful special interests. Indeed, if one wanted to seek who the last should be to decide who should govern, it is at the junction of economic power and predatory political purpose that one should look. In any practical world, allowing Big Oil or Big Pharma, masked, to decide who should govern is a far worse

Against the onslaught of the corporate influencer class, knowledgeable, patient and independent administrative agencies stand as an important public safeguard—a safeguard overseen by Congress and checked by judicial review. While critics of administrative deference argue that it allows agencies to set policy without adequate process or constraint, none of these concerns is present in this case, where even the Trump administration urged this Court to deny review. At some point, the Court must recognize the contest between forces of vast political influence, and a general public that needs government agencies to defend it from those forces. One of the bulwarks of that defense has for decades been administrative agencies diligently serving the public interest, to the sometime annoyance of the regulated industry.

For the first time in its history, the Supreme Court is "completely devoid of a single individual who has ever participated in electoral politics."[29] The result has been seriously flawed assumptions about the consequences of its decisions, and findings that experience has proven to have been clearly erroneous.[30] I hope this brief is helpful to the Court,

---

scenario—but it is where this Court's election law decisions have led us.

[29] Edsall, *supra* note 27 (quoting Professor Sanford Levinson and Fred Wertheimer).

[30] *See Citizens United*, *supra* note 26; Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1, 36–37 (2012)

("What has happened since *Citizens United* . . . is not new regulation—it is the rollback of existing regulation. Instead of a hydraulics of campaign finance regulation, we are seeing a reverse hydraulics of campaign finance deregulation . . . . The reverse-hydraulic effects for the 2010 elections were clear. First, independent expenditures exploded upward in 2010 by more than 300 percent compared to the previous midterm elections in 2006. They increased from less than $75 million total in 2006 to roughly $300 million in 2010. Second, independent expenditures by outside groups in particular increased dramatically."); *Shelby County v. Holder*, 570 U.S. 529 (2013); Joel Heller, *Shelby County and the End of History*, 44 U. Mem. L. Rev. 357, 389–90 (2013) ("The proposition that officials in formerly covered jurisdictions might push forward with potentially problematic voting policies without evaluating their potential to abridge the right to vote finds support in the actions of Texas officials in the immediate aftermath of the Shelby County decision. Within minutes of the Court's announcement of its decision striking down the coverage formula, Texas Attorney General Greg Abbott announced via Twitter that the state's controversial photo-identification law, which the Department of Justice had refused to preclear, would go into effect immediately. With only somewhat less alacrity than their counterparts in Texas, officials in other states began implementing similarly controversial voting policies in the months after the Shelby County decision"); Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, The Atlantic (July 10, 2018) ("The results [of *Shelby County*] have been predictable. Voter-identification laws, which experts suggest will make voting harder especially for poor people, people of color, and elderly people, have advanced in several states, and some voting laws that make it easier to register and cast ballots have been destroyed. For many of the jurisdictions formerly under preclearance, voting became rapidly more difficult after the *Shelby County* decision, particularly for poor and elderly black people and Latinos.").

given its dearth of practical experience in the rough and tumble of massive political forces seeking power.

CONCLUSION

For the foregoing reasons, the Court should dismiss the case as improvidently granted or affirm the Federal Circuit's decision.

Respectfully submitted,

Sen. Sheldon Whitehouse
Counsel of Record
Hart Senate Office Bldg., Rm. 530
Washington, DC 20510
(202) 224-2921
counsel@whitehouse.senate.gov

Jason P. Steed
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Ave., Ste. 4400
Dallas, TX 75201
(214) 922-7112
jsteed@kilpatricktownsend.com

March 4, 2019